

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,
4 STATE OF ARIZONA, CONNECTICUT,
5 IDAHO, ILLINOIS, IOWA, MARYLAND,
6 MICHIGAN, MISSOURI, MONTANA,
7 NEBRASKA, NEW HAMPSHIRE,
8 OHIO, RHODE ISLAND, TENNESSEE,
9 TEXAS, UTAH AND VERMONT,

Plaintiff,

versus

10-CV-4496 (NGG) (RER)

10 AMERICAN EXPRESS COMPANY, ET AL.,
11 Defendant.

United States Courthouse
Brooklyn, New York

12 -----x
13 August 13, 2014
9:00 a.m.

14 Before: HON. NICHOLAS G. GARAUFIS, District Judge

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ALLAN R. SHERMAN, CSR, RPR Official Court Reporter
United States District Court Eastern District of New York

1 THE COURT: Appearances.

2 MR. HAMER: Craig Conrath for the United States.

3 Good morning.

4 MS. SCHNEIDER: Anne Schneider with the State of
5 Missouri for the plaintiffs.

6 MR. CHESLER: Evan Chesler for American Express.

7 MR. FLEXNER: Donald Flexner for American Express.

8 THE COURT: Good morning.

9 Is there something we need to do before we begin
10 with the first witness who is a government witness?

11 MR. CONRATH: That's correct.

12 We have one housekeeping matter, your Honor.

13 We failed the other day to admit PX 2756 as a
14 demonstrative during the testimony of Mr. Flueck from
15 Starwood.

16 We move the admission of PX 2756 as a demonstrative.

17 MR. CHESLER: No objection, your Honor.

18 THE COURT: PX?

19 MR. CONRATH: 2756, your Honor.

20 THE COURT: 2756 is admitted as a demonstrative
21 exhibit without objection.

22 Now we are going to proceed with the witness who
23 couldn't be available due to illness while you were presenting
24 your case, correct?

25 MR. CONRATH: Correct, your Honor.

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1 And after that, I hope we can take care of the
2 famous documents with a quick procedure and then we'll do
3 defendant's witness.

4 THE COURT: Who is going to examine?

5 MR. CONRATH: Ms. Mitchell-Tombras will be examining
6 the witness, Mr. Mitchell.

7 THE COURT: Anything from the defense before we
8 start?

9 MR. CHESLER: No, your Honor.

10 THE COURT: Let's proceed with the first witness.

11 MS. MITCHELL-TOMBRAS: Your Honor, the United States
12 calls Benjamin Mitchell of Official Payments.

13 BENJAMIN MITCHELL, having been called as a
14 witness, first being duly sworn, was examined and
15 testified as follows:

16 THE CLERK: Please state your name for the record.

17 THE WITNESS: Ben Mitchell.

18 THE COURT: Spell your last name.

19 THE WITNESS: M-I-T-C-H-E-L-L.

20 THE COURT: Speak into the microphone.

21 You may start.

22 MS. MITCHELL-TOMBRAS: Your Honor, may I approach
23 with the binder?

24 THE COURT: Yes, you may.

25 DIRECT EXAMINATION

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1 BY MS. MITCHELL-TOMBRAS:

2 Q Good morning, Mr. Mitchell.

3 A Good morning.

4 Q I'd like to begin by asking you a few background
5 questions about your employer and role in the company?

6 A Okay.

7 Q Who do you work for?

8 A I work for ACI Worldwide.

9 Q Is there a relationship between ACI Worldwide and
10 Official Payments?

11 A Yes, ACI acquired Official Payments last fall.

12 Q Does Official Payments still operate as a business unit
13 under ACI Worldwide?

14 A Yes.

15 Q Do your responsibilities fall under Official Payments?

16 A They do.

17 Q What is the business of Official Payments?

18 A Official Payments is a company that provides convenience
19 fee based technology to our clients who are typically the
20 billers who provide utility services or require collection of
21 taxes or university payments like tuition and fees, fines, et
22 cetera.

23 Q You mentioned the kind of billers that you have.

24 You said your clients are utilities, universities.

25 Are any others?

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1 A Those are the primary billers. So there is the federal
2 government for IRS tax payments. There are county and local
3 governments for tax payments, dog licenses, municipal
4 utilities, pretty much anything you can think of that a county
5 might need to collect payments for we will support as well as
6 universities and colleges like community colleges.

7 Q Mr. Mitchell, if you would turn in the binder that I
8 handed you to DX 7476.

9 I believe it's behind the first tab.

10 A Okay.

11 Q Have you seen this before?

12 A Yes.

13 Q What is it?

14 A This is the primary landing page for our Official
15 Payments.com website. So when you go to Official Payments.com
16 on the web, you'll start here.

17 Q If you would look at the four gray boxes in the middle of
18 the page, do those accurately depict the type of institutions
19 for which you provide payment services?

20 A Yes.

21 MS. MITCHELL-TOMBRAS: Your Honor, we offer DX 7476
22 into evidence.

23 MR. BRENNER: No objection.

24 THE COURT: DX 7476 is in evidence.

25 (So marked in evidence as Defendants'

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1 Exhibit DX 7476.)

2 Q Mr. Mitchell, what is your current position?

3 A Currently I'm vice president of client services and card
4 processing.

5 Q At a high level, what are your responsibilities?

6 A I'm primarily responsible for our card association
7 relationships, relationships with Visa, Mastercard, American
8 Express, Discover Card as well as our processing relationships
9 with banks and their corresponding processing entities that
10 allow us to connect to the networks for authorization of
11 settlement.

12 Q How long have you been in that position?

13 A I've been in this particular position with ACI since the
14 acquisition in October.

15 Q Prior to the acquisition, what was your position?

16 A Senior vice president of business architecture at
17 Official Payments.

18 Q In that position, what were your responsibilities?

19 A Substantially the same with the exception of much broader
20 responsibilities for corporate strategy and direction of the
21 company.

22 Q Can you describe in general terms what you mean by
23 corporate strategy?

24 A So just looking at the changes in payments, where
25 payments technology is going, changes in regulation and

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1 overall industry knowledge and expertise so that I can help
2 guide the company towards the future of payments.

3 Q How long have you been in the payment services business?

4 A Since the late '80s.

5 Q How did you get started?

6 A I was part of a small company in Auburn, Alabama, one of
7 the founders of the company. And one of the services that we
8 provided early on was interactive voice response technology to
9 colleges and universities where we were helping them provide
10 different avenues for students to register for classes.

11 Back in the late '80s, early '90s, registering for
12 classes at a university or community college was very
13 difficult. You stood in line for hours. And we developed
14 technologies that would allow the students to essentially call
15 in from wherever they were and register for their classes.

16 During that time, we also discovered that many
17 universities would have registration blocks, so if you had a
18 library fine or a parking ticket or something like that from
19 your previous semester or quarter, you were not allowed to
20 register until that fine was cleared.

21 So as part of that discovery, we developed
22 technology to allow the students to pay with a credit card,
23 pay that fine with a credit card while they were essentially
24 on the phone trying to finish the registration.

25 So it made the process a lot easier for the schools

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1 and for the students who at the time and probably still is a
2 lot of competition for classes.

3 Q At what point did the company that you founded become
4 part of Official Payments?

5 A We were acquired by a company called Tier Technologies in
6 2004 and Tier Technologies had also bought a company called
7 Official Payments who was in a competitive space with us, but
8 they were primarily focused on taxes where we were primarily
9 focused on higher education.

10 As part of that acquisition, Tier combined EPOS,
11 which was the company I helped found, with Official Payments.

12 Q Does EPOS stand for anything?

13 A No, it doesn't. It should. A lot of times we talked
14 about electronic point of sales, whatever, payments, but it
15 really didn't stand for anything. We were just students
16 graduating from college and created a name for a company that
17 could mean anything because we didn't know what we were going
18 to do.

19 Q I'd like to ask you a few more questions about the
20 Official Payments business model.

21 First, approximately how many payment transactions
22 does Official Payments process each year?

23 A About 20 million.

24 Q Approximately what is the total dollar volume of those
25 transactions processed by Official Payments?

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1 A It's ten plus million.

2 Q With whom does Official Payments contract to do the
3 processing?

4 A We contract directly with the entity that issues the
5 bill. So we call them billers. So that would be your county
6 government or higher ed, school, utility, so they are our
7 billers. So they produce the bills that are then paid by the
8 consumers.

9 Q Approximately how many billers do you work with?

10 A About 3500 different entities.

11 Q What are the advantages for consumers of using Official
12 Payments to pay bills?

13 A There are a couple of key advantages. One is primarily
14 the fact that we have a direct relationship with the biller
15 and provide on-line technology, interactive voice response,
16 mobile sites, websites, et cetera. We allow the consumer to
17 pay their bill all the way up to the last minute and the
18 biller accepts that payment as being good even before they
19 received the money.

20 So that's one of the key advantages. The other is
21 just the convenience of being able to make a payment wherever
22 you are at any time.

23 Q In your experience, do you find that consumers tend to
24 pay their bill at a particular point regarding the deadline?

25 A Yes, people tend to pay towards the end of the deadline.

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1 The closer to the deadline, the better for them.

2 Q Approximately what percentage of Official Payments
3 transactions are conducted on line or through mobile?

4 A Roughly 80 percent are on line or through mobile.
5 Another 20 percent or so are interactive voice response.

6 Q For your transactions on line and mobile, have they been
7 increasing or decreasing over time?

8 A The trend is definitely to on line and mobile and away
9 from interactive voice response.

10 Q If a customer chooses to pay for bills through Official
11 Payments, what are the components of the total payment?

12 A There are two parts of the payment. There is the bill
13 itself that you owe, then there is a fee that Official
14 Payments includes. We call it a convenience fee or service
15 fee depending on the situation.

16 Q Why does Official Payments charge a convenience fee?

17 A The convenience fee is there to cover the cost of the
18 transaction. So the cost of the transaction includes any
19 interchange or network costs as well as Official Payments'
20 operating costs.

21 Q You said that one of the costs that the convenience fee
22 covers is the cost of interchange or card acceptance, is that
23 correct?

24 A That's correct?

25 Q Approximately how much of the revenue from the

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1 convenience fee goes to the cost for the card acceptance?

2 A The card acceptance cost is the largest percentage of the
3 total fee. So it's our largest cost within our business
4 model.

5 Q Are a majority of Official Payments' revenue generated by
6 convenience fees?

7 A They are.

8 Q Does Official Payments accept credit cards?

9 A We do.

10 Q Which cards do you accept?

11 A American Express, Visa, Mastercard and Discover and some
12 of the minor Discover brands like JCB, things like that.

13 Q Does Official Payments accept all four credit card
14 networks for every billing institution?

15 A No, we don't.

16 Q Why not?

17 A We give our clients an option of adding American Express
18 or not and when they want American Express, then the consumer
19 cost goes up.

20 So they are giving -- we're giving them an option of
21 including American Express or just having Visa, Mastercard and
22 Discover at a lower cost.

23 Q When you say if they add American Express, the price goes
24 up, what do you mean by that?

25 A The price of the convenience fee or service fee is higher

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1 when American Express is included in the mix of cards.

2 Q As part of your responsibilities, do you track which
3 payment forms consumers use on Official Payments?

4 A Yes, we do.

5 Q Does Official Payments accept debit cards?

6 A We do.

7 Q Do you analyze the characteristics of transactions made
8 with particular payment forms?

9 A Yes, we do.

10 Q Has Official Payments observed any patterns of usage
11 between credit cards and debit cards?

12 A Consumers will generally choose to use a debit card when
13 the payment -- when the total payment they are making is less
14 than \$300. The transaction counts are heavily skewed to debit
15 cards in the smaller form of payments, smaller bills.

16 Q Was this observation true in your business five years
17 ago?

18 A It was.

19 Q Is it still true today?

20 A It is.

21 Q Does Official Payments pay fees to the credit card
22 networks in exchange for card acceptance?

23 A We do.

24 Q As part of your responsibility, do you track the fees
25 that Official Payments pays to the credit card networks for

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1 acceptance?

2 A Yes.

3 Q Do you track the cost of acceptance by network?

4 A Yes.

5 Q Without saying any numbers, which credit card network is
6 the most expensive that you accept?

7 A American Express.

8 Q How closely do you track the cost of accepting cards?

9 A We track it very closely. We either know in realtime
10 what the cost of a particular transaction is going to be or
11 the next day when the transactions settle or in worst case,
12 it's the end of the month.

13 There is not a single transaction that we process
14 that we don't know the exact cost of that transaction by the
15 end of the month.

16 Q Within a particular card network, say Visa or Mastercard,
17 do you know how much transactions on different types of cards
18 cost?

19 A Yes, we do.

20 Q Why do you track these costs so closely?

21 A Because our whole business model is founded on
22 understanding the cost of the transaction so that we can then
23 offer appropriate levels of service to our consumers at the
24 lowest cost possible to them.

25 Q Mr. Mitchell, I'd now like to focus in and ask you some

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1 questions specifically about Official Payments tax business.

2 Are federal income tax payments one type of payment
3 transaction that Official Payments processes?

4 A Yes.

5 Q Does that include both personal and business?

6 A It does, yes.

7 Q Does Official Payments accept credit cards for federal
8 tax payment transactions?

9 A Yes.

10 Q Which credit card networks do you accept for those kinds
11 of transactions?

12 A Visa, Mastercard, American Express, Discover.

13 Q How long has Official Payments been processing tax
14 payments for the IRS?

15 A We were the original vendor who piloted the program with
16 the IRS starting in 1999.

17 Q Have you processed payments continuously since then?

18 A Yes.

19 Q What institution is Official Payments' single largest
20 billing client in terms of revenue?

21 A The IRS is.

22 Q For federal income tax payments made through Official
23 Payments, do you charge a convenience fee?

24 A Yes, we do.

25 Q How many processors of federal income tax payments are

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1 there?

2 A Currently, there are three.

3 Q Does that mean that if a customer, a taxpayer wants to
4 pay her taxes by credit card or debit card, she has three
5 provider options?

6 A That's right.

7 Q Does Official Payments compete with the other two
8 processors for customers business?

9 A Yes, we do.

10 Q How do the three current processors receive the authority
11 to process payments for the IRS?

12 A In 2009, the IRS issued an RFP and the three -- there
13 were lots of vendors obviously that responded. They selected
14 three vendors to support their program.

15 Q Approximately what is the total dollar volume of all
16 federal tax payment transactions processed by Official
17 Payments?

18 A About two and a half billion dollars in dollar volume.

19 THE COURT: Over what period?

20 THE WITNESS: A year, annually.

21 Q Of that total dollar volume each year, how much of those
22 transactions are made on American Express cards?

23 A Roughly, a third of those transactions are American
24 Express cards.

25 Q In the federal tax base, which credit card network is the

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1 most expensive to accept?

2 A American Express is.

3 Q Is one of your job responsibilities to manage credit card
4 costs for Official Payments?

5 A Yes.

6 Q As part of that responsibility, do you consider whether
7 accepting certain payment forms makes good business sense for
8 Official Payments?

9 A Yes.

10 Q Why do you accept American Express for federal income tax
11 payments?

12 A American Express is an important card type for us in the
13 tax space because taxpayers especially those with high balance
14 due tend to use an American Express card. They are more
15 affluent. They spend more money and they are American Express
16 card members and they prefer to use their Amex card.

17 Q If you didn't accept American Express in the federal tax
18 space, what do you think would happen?

19 A We would lose those consumers to one of the competitors.

20 Q If a taxpayer wants to pay his federal tax liability with
21 a credit or debit card, what are the ways that he can find
22 Official Payments to make that transaction?

23 A There are several different ways.

24 One is they may be an Official Payments user for a
25 long time going back to 1999 when we started the program.

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1 They may have been part of our program for many years and they
2 would know about us.

3 Secondarily, we advertise our services, especially
4 during tax time on Google, Yahoo, Bing, the various search
5 engines as well as print and radio-type media and other types
6 of media. They can also find it through the IRS.gov site. So
7 if they are looking for different ways to pay and they are
8 looking at the IRS, then the IRS makes it easy for people to
9 find out how to pay by credit card.

10 Also the card associations will regularly advertise
11 the service and capability to their cardholders.

12 Q The first you said is that they might already be Official
13 Payments users?

14 A Right.

15 Q And if that is the case, how would they access you if
16 they already knew about you?

17 A Typically they are going to either type in Official
18 Payments.com, they may have bookmarked our site. So they will
19 come directly to us, they won't go through Google or Yahoo or
20 even another location. They will come directly in.

21 Q You also mentioned the IRS.gov website as a way to find
22 you, is that correct?

23 A That's correct.

24 Q Are you familiar with the web pages on the IRS.gov
25 website that help a taxpayer navigate to figure out how she

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1 can pay her tax liability with a credit or debit card?

2 A Yes, I am.

3 Q Is it something that you are familiar with in the
4 ordinary course of your business?

5 A Yes.

6 Q Mr. Mitchell, would you please turn in your binder to the
7 Exhibit PX 2765 at the sixth tab.

8 A Okay.

9 Q Please take a moment to look at it if you need to. Do
10 you recognize the content of this document?

11 A Yes.

12 Q What is it?

13 A This is the IRS.gov website that you can navigate to that
14 will show to you as a taxpayer the various ways you can pay
15 your tax due, your balance due through the various providers
16 that IRS has contracted with.

17 Q If you look on the left-hand side of the page, you see
18 the six URL links?

19 A I do, yes.

20 Q If you look at the last two links, what are those?

21 A Those are the two sites that are provided by Official
22 Payments to consumers, taxpayers to pay their taxes.

23 Q If a taxpayer clicks on the first Official Payments link,
24 what would happen?

25 A They would go to the primary website for the IRS payments

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1 within Official Payments.

2 Q If a taxpayer clicks on the second Official Payments
3 link, what would happen?

4 A They would go to an alternate brand that we would have
5 developed called Choice Pay. So they wouldn't see Official
6 Payments, it would just be in a Choice Pay site with a
7 different service level for them.

8 MS. MITCHELL-TOMBRAS: Your Honor, I offer PX 2765
9 into evidence for demonstrative purposes only.

10 MR. BRENNER: No objection.

11 THE COURT: PX 2765 is received in evidence for
12 demonstrative purposes.

13 (So marked in evidence as Plaintiff's
14 Exhibit PX 2765.)

15 MS. MITCHELL-TOMBRAS: Thank you, Mr. Mitchell. You
16 can put that aside for now.

17 Q Has Official Payments always had two websites for
18 processing federal tax payments?

19 A No.

20 Q Approximately when did Official Payments launch the
21 second website?

22 A In 2011 we created the Choice Pay brand.

23 Q Was this before or after the RFP award was announced?

24 A It was after.

25 Q What motivated Official Payments to create the second

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1 website?

2 A Competitive pressure from the other vendors that the IRS
3 contracted with to produce a lower price ability for consumers
4 to pay their taxes at a lower convenience fee.

5 Q When you say competitive pressure, can you explain what
6 you mean by that?

7 A One of the other vendors developed a lost cost
8 competitive brand that only offered a single card type and
9 offered a lower level of service. So Official Payments
10 decided to compete directly with that by creating a similar
11 competitive brand.

12 Q Did the processor that you are referring to offer
13 American Express?

14 A No.

15 Q Did Official Payments consider other alternatives before
16 deciding on the second website?

17 A Yes, we did.

18 Ideally, we have rather kept Official Payments.com,
19 it's our primary brand, it's been out there since 1999.
20 People know it, trust Official Payments, have used it. So our
21 original desire would have been to keep Official Payments.com,
22 lower the convenience fee and offer a more competitive level
23 of service on that site.

24 Q And why didn't you do that?

25 A The anti-discrimination rules for the card types in

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1 general would prevent us from just offering differentiated
2 pricing and providing consumers with a choice on price based
3 on the card that they choose to use.

4 Q When you say that card associations' rules did not permit
5 that, can you explain what you mean?

6 A Right, so the rules basically tell us that we have to
7 essentially sell our service for any type of card at the same
8 price irrespective of what that particular card costs us to
9 process.

10 So we're only able to offer our service when we
11 offer varying card types at the same price regardless of the
12 card itself.

13 Q What did those provisions stop you from doing that you
14 otherwise wanted to do?

15 A Without those types of provisions in place, we would
16 competitively price the transaction more centric to the card
17 type itself so that the consumer would pay more if they chose
18 to use a more expensive card and they would pay less if they
19 chose to use a less expensive card.

20 Q What did Official Payments ultimately decide to do?

21 A We were unable to obviously change the rules in any way
22 so our response was to create a competitive brand, the Choice
23 Pay brand, and to deliver that to the consumers with only a
24 single card type available to them.

25 Q What was that card type?

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1 A Mastercard.

2 Q And how was Official Payments able to offer Mastercard
3 credit on the second brand?

4 A In the tax payment space, the Mastercard cost structure
5 was the best one for us and was -- in terms of cost, it
6 allowed us to offer the lowest cost to the consumer and the
7 lowest cost to us as a business for acceptance, so the
8 economics worked out for us to build our competitive brand and
9 include Mastercard only for that particular option.

10 Q Do you recall what the convenient fee was for Mastercard
11 credit transactions on the Choice Pay site in 2011?

12 A 1.9 percent.

13 Q How did that compare with the convenience fee for all
14 credit transactions on the Official Payments site in 2011?

15 A It was significantly lower.

16 Q Did Official Payments advertise the existence of a second
17 lower price site on the Official Payments site?

18 A No, we did not.

19 Q Did Official Payments link to the second lower price site
20 on the primary Official Payments site?

21 A No, we did not.

22 Q Why not?

23 A That would be exactly the same as offering Mastercard on
24 the primary website at a lower cost to the other brands which
25 would have in our view been against the association rules for

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1 discriminating card types.

2 Q Aside from processing payments only on Mastercard at a
3 lower convenience fee, did the Choice Pay site otherwise
4 differ from the Official Payments site regarding how
5 transactions are processed?

6 A No.

7 Q At the time of the Choice Pay launch in 2011, how did the
8 1.9 percent Mastercard credit fee compare to the other
9 processors' convenience fee for credit card transactions?

10 A It was the lowest market price available at that time.

11 Q Did offering a low price for Mastercard credit
12 transactions provide an advantage to Official Payments?

13 A We believe it did.

14 Q What were those?

15 A Well, the Choice Pay brand collected some new users, some
16 new taxpayers that we had not seen in our previous Official
17 Payments.com databases, so we believe that it did attract new
18 users, new consumers to our services.

19 Q Did it also provide any benefits to consumers?

20 A Those that found it and had a Mastercard paid us a lower
21 fee for the same transaction.

22 Q Did Official Payments track the performance of the Choice
23 Pay site?

24 A Yes, we did.

25 Q What did you conclude from tracking that performance?

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1 A That consumers definitely -- there are definitely cost
2 shopping consumers and it was important for them to find the
3 lowest cost option available. And as I said before, we
4 clearly collected some new users of our service as a result.

5 Q Is there a cost to Official Payments to run the second
6 site, the Choice Pay site?

7 A Yes, there is.

8 Q What are those costs?

9 A It's essentially a duplicate of our primary Official
10 Payments federal site. Because of the way the IRS operates,
11 we had to separate it completely. We have technology teams
12 that manage both sites individually. And in addition, the IRS
13 itself has to go through their very in-depth audit of both
14 sites separately.

15 So in terms of technology and preparation, operation
16 and audit, it's a double -- it's extra work, twice the extra
17 work.

18 Q Does Official Payments currently maintain the Choice Pay
19 site for processing federal tax payments?

20 A Yes, we do.

21 Q Does Official Payments still operate the site at a lower
22 cost option?

23 A Yes.

24 Q What credit card networks are currently on the Choice Pay
25 site?

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1 A Visa and Mastercard.

2 Q When did Visa launch on the site?

3 A They launched last year.

4 Q Do you accept Visa for credit transactions on the Choice
5 Pay site?

6 A Yes.

7 Q How did Visa inclusion come about?

8 A Visa wanted to be on the site and we entered into
9 negotiations with them to develop a cost structure that
10 Official Payments and ACI could -- the economics would work
11 out for us so we would be able to include them on the site at
12 the lower price.

13 Q Was Official Payments successful in negotiating the lower
14 price with them?

15 A Yes, we were.

16 Q Are there any plans to include American Express on the
17 Choice Pay site?

18 A Yes.

19 Q How did the inclusion of American Express come about?

20 A It was essentially the same thing. American Express
21 wanted to be on the site and they understood that from their
22 point of view, they wanted to be associated with Official
23 Payments tax payments and as a result, we entered into
24 negotiations with them as well to develop a cost structure
25 that would allow for their inclusion on the site.

Mitchell/Direct/Mitchell-Tombras

1 Q How did those negotiations proceed?

2 A Difficult.

3 Q What do you mean by difficult?

4 A So American Express -- we found it very difficult to
5 negotiate with them. And we as a company need a particular
6 income in order to operate efficiently and American Express
7 wouldn't agree to those types of cost structures for us. So
8 we essentially declined the offer and decided not to include
9 American Express.

10 As a result of that, American Express decided to
11 cancel our processing agreement with them for IRS payments in
12 total.

13 Q What happened after American Express canceled your
14 agreement?

15 A As we talked about earlier, American Express is an
16 important card type for us and we, not being able to utilize
17 it on Official Payments.com was a problem for us. So we went
18 back to the negotiation table with American Express and
19 finally came to an agreement on a cost structure that would
20 work for us at least well enough to continue offering the card
21 type.

22 Q Was the discount rate that you finally reached with
23 American Express for transactions on the Choice Pay site lower
24 than the discount rate for American Express transactions on
25 the Official Payments site?

Mitchell/Direct/Mitchell-Tombras

1 A It is, yes.

2 Q In 2015, will American Express, Visa and Mastercard
3 credit cards be offered on the Choice Pay site?

4 A Yes, they will.

5 Q Will all three credit card networks be offered at the
6 same price?

7 A Yes.

8 Q Which of the credit card networks is the most expensive
9 for you to accept on the Choice Pay site?

10 A American Express.

11 Q Can you charge lower prices for less expensive cards on
12 the Choice Pay site?

13 A No.

14 Q Why not?

15 A The anti-discrimination rules for American Express are
16 still in place, therefore we have to price all of the card
17 brands the same, at the same rate.

18 Q Will American Express' inclusion on the Choice Pay site
19 have any effect on your negotiating posture with Visa and
20 Mastercard?

21 A Yes, it will, because now it makes it much more difficult
22 to continue to drive the price to the consumer down and drive
23 the corresponding costs down through competitive pressure and
24 negotiation.

25 MS. MITCHELL-TOMBRAS: Your Honor, I'm now going to

Mitchell/Direct/Mitchell-Tombras

1 ask questions about the document that Official Payments has
2 requested a small portion of to be sealed.

3 I have some questions before then but I just wanted
4 to inform the Court that when I get there, I will ask to have
5 the courtroom sealed.

6 THE COURT: Seal the courtroom?

7 MS. MITCHELL-TOMBRAS: Correct.

8 THE COURT: Let me know.

9 Q Mr. Mitchell, if you would now please turn to the
10 document in your binder marked PX 1337 A. It's located behind
11 the second tab.

12 A Okay.

13 Q Please take a moment to look at it if you need to?

14 A Okay.

15 Q Are you familiar with this document?

16 A Yes.

17 THE COURT: Is this --

18 MS. MITCHELL-TOMBRAS: Yes, we can publish this
19 part.

20 THE COURT: It says confidential on it, which raises
21 a red flag.

22 Is it redacted in such a way that this document can
23 be shown to the public?

24 MS. MITCHELL-TOMBRAS: Yes, your Honor, the pages
25 that we will go through first are okay and I'll advise you

Mitchell/Direct/Mitchell-Tombras

1 when we need to close the courtroom.

2 THE COURT: Thank you.

3 Q Mr. Mitchell, what is this document?

4 A This document is an internal training presentation that
5 we put together to help our management team, our product
6 mangers, executive management, et cetera, to understand the
7 changes in the industry that were being really reflected by
8 the Department of Justice settlement with Visa, Mastercard and
9 also the Durbin Amendment that was in discussion at the same
10 time.

11 Q Were you involved in preparing this presentation?

12 A Yes.

13 Q Was the document prepared in the regular course of
14 business?

15 A It was, yes.

16 Q Is it the regular practice of Official Payments to create
17 documents like this?

18 A Yes.

19 MS. MITCHELL-TOMBRAS: Your Honor, I offer PX 1337 A
20 into evidence.

21 And for the record, it's marked PX 1337 A because
22 it's a reproduced copy of the original that is just clearer.

23 MR. BRENNER: No objection.

24 THE COURT: PX 1337 A is received in evidence.

25 (So marked in evidence as Plaintiff's

Mitchell/Direct/Mitchell-Tombras

1 Exhibit 1337A.)

2 Q Was this document in fact presented?

3 A It was.

4 Q Was that an internal or external meeting?

5 A It was an internal meeting.

6 Q Were you present at the internal meeting where it was
7 presented?

8 A Yes.

9 Q I'd ask you to walk us through some of the pages of the
10 document.

11 If you would first turn to the page ending 057?

12 Do you see that?

13 A Yes.

14 Q What is this slide?

15 A This slide is summarizing the Department of Justice
16 settlement with Visa and Mastercard over the ability to steer
17 consumers to lower cost alternatives or offer them rebates or
18 discounts or other types of services based on their choice to
19 use a lower cost transaction type.

20 Q If you would turn one page to 058.

21 The title here is: Department of Justice
22 Possibilities.

23 Do you see that?

24 A I do.

25 Q What does that title refer to?

Mitchell/Direct/Mitchell-Tombras

1 A This is really just a way to provide an example and to
2 put into context for the team what the potential would be for
3 us to offer to our consumers a very direct and easy way for
4 them to see the various costs of different card types and let
5 them choose which transaction type was important to them.

6 Q If you look below the title, there are two images.

7 Do you see those?

8 A Yes.

9 Q What are those images depicting?

10 A The images are just depicting some possibilities, very
11 early conceptual possibilities of how we might present to the
12 consumer differentiated price based on card type.

13 Q And in your discussion of these possibilities, did
14 American Express' anti-steering rules come up?

15 A Yes, it was a key part of the discussion because
16 obviously the team wanted to know why American Express wasn't
17 represented because they know American Express is an important
18 card type to our consumers and so we had discussions specific
19 to their anti-discrimination rules and why they couldn't be
20 part of this type of steering activity.

21 Q If you accept American Express, can you have a web page
22 like the two on 058?

23 A No.

24 Q Why not?

25 A The anti-discrimination rules as we discussed previously,

Mitchell/Direct/Mitchell-Tombras

1 they cause us or required us to price all of the competitive
2 card types the same to the consumer.

3 Q Does Official Payments currently have some clients that
4 do not accept American Express for bill payments?

5 A Yes.

6 Q For those clients, does Official Payments currently offer
7 different prices for different kinds of credit cards?

8 A No, we don't.

9 Q Why not?

10 A The development of the technology to provide the steering
11 and to provide the different shade of price really requires
12 the whole platform and the whole level of service to be
13 offered to the consumer, otherwise the economics just really
14 aren't there for us.

15 MS. MITCHELL-TOMBRAS: Your Honor, at this time I
16 would ask on behalf of Official Payments that we close the
17 courtroom.

18 MR. BRENNER: We have no objection.

19 THE COURT: All right, about how long will the
20 courtroom be closed?

21 MS. MITCHELL-TOMBRAS: I believe only about 10 or 15
22 minutes.

23 THE COURT: I'm going to ask anyone who is not on
24 the government or defense team or who are working for the
25 Court to leave the courtroom at this time for a few minutes.

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1 MR. CONRATH: The Official Payments lawyer is here
2 and I guess the question is whether the plaintiff's lawyer,
3 the class plaintiffs can stay. It can be maybe addressed by
4 the Official Payments lawyer.

5 THE COURT: Will the Official Payments lawyer please
6 come forward.

7 MS. OTT: Patrice Ott, outside counsel for Official
8 Payments for Mr. Mitchell in this matter.

9 And to my understanding, the gentleman and lady back
10 there have been permitted to be in the courtroom for the
11 testimony and it's our position to be consistent with how this
12 has been handled with the prior witnesses, if they would like
13 to remain in the courtroom, it's fine.

14 THE COURT: Under the same terms and conditions.

15 MS. OTT: Yes, as prior witness testimony.

16 THE COURT: Where are you from?

17 MS. OTT: Omaha, Nebraska.

18 THE COURT: Are you with a firm?

19 MS. OTT: I am. Kolley Jessen.

20 THE COURT: Welcome to New York.

21 MS. OTT: Thank you. I've had a wonderful time so
22 far.

23 THE COURT: Thank you very much.

24 We just need to wait a moment to make sure the feed
25 has been turned off in the other room.

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1 MR. CONRATH: I should have reminded the Court at
2 the beginning of the day about this.

3 THE COURT: That's all right.

4 (Pause.)

5 THE COURT: The courtroom is sealed.

6 Correct?

7 THE CLERK: Yes, judge.

8 THE COURT: The courtroom is sealed and the
9 transmission to the overflow courtroom has been cut so we can
10 begin with the sealed portion of the testimony for the
11 witness.

12 You can may proceed.

13 (The following testimony and transcript is sealed.)

14 Q [REDACTED]

15 [REDACTED]

16 [REDACTED] Durbin [REDACTED].

17 Do you see that?

18 A Yes.

19 Q Are you familiar with this slide?

20 A I am.

21 Q I'd like to break it down and ask you to walk us through
22 some of the bullets on the slide.

23 The subheading underneath the title says [REDACTED]

24 [REDACTED].

25 What does that mean?

Mitchell/Direct/Mitchell-Tombras

1 A [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED].

5 Q And if you look at the five bullets underneath, the first
6 bullet states: "[REDACTED]."

7 What does that mean?

8 A [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 Q [REDACTED]
19 [REDACTED]

20 A [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Mitchell/Direct/Mitchell-Tombras

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Q [REDACTED]

5 [REDACTED]

6 A [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 Q [REDACTED]

12 A [REDACTED]

13 Q [REDACTED]

14 A [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Q [REDACTED]

21 [REDACTED]

22 A [REDACTED]

23 Q [REDACTED]

24 [REDACTED]

25 A [REDACTED]

Mitchell/Direct/Mitchell-Tombras

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 Q Mr. Mitchell, if you would look at the next bullet, it
11 says: [REDACTED] [REDACTED]"

12 What does that mean?

13 A [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Q [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 A [REDACTED]

Mitchell/Direct/Mitchell-Tombras

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 Q [REDACTED]
7 [REDACTED]
8 A [REDACTED]
9 Q [REDACTED]
10 [REDACTED]
11 A [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 Q [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 A [REDACTED]
21 Q [REDACTED]
22 A [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Q Mr. Mitchell, if you look at the next bullet, it reads:

Mitchell/Direct/Mitchell-Tombras

1 [REDACTED]

2 What does that mean?

3 A [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q [REDACTED]

15 [REDACTED]

16 A [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q [REDACTED]

22 Have you seen this document before?

23 A Yes.

24 Q [REDACTED]

25 A [REDACTED]

Mitchell/Direct/Mitchell-Tombras

1 [REDACTED]

2 Q [REDACTED]

3 A [REDACTED]

4 Q [REDACTED]

5 [REDACTED]

6 A [REDACTED]

7 Q [REDACTED]

8 A [REDACTED]

9 Q [REDACTED]

10 [REDACTED]

11 A [REDACTED]

12 Q [REDACTED]

13 [REDACTED]

14 A [REDACTED]

15 [REDACTED]

16 MS. MITCHELL-TOMBRAS: Your Honor, I offer PX 2760
17 in evidence.

18 MR. BRENNER: No objection.

19 THE COURT: PX 2760 is received in evidence.

20 (So marked in evidence as Plaintiff's
21 Exhibit PX 2760.)

22 Q [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 A [REDACTED]

Mitchell/Direct/Mitchell-Tombras

1 Q [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 A [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 MS. MITCHELL-TOMBRAS: Your Honor, I have just two
9 or three more questions. They don't need to be with the
10 closed courtroom.

11 Would you like me to proceed or wait to open the
12 courtroom?

13 THE COURT: Mr. Brenner, is there going to be
14 cross-examination on questions that were requested that were
15 in a sealed posture?

16 MR. BRENNER: I do expect to follow up on it, yes,
17 your Honor.

18 THE COURT: How much more do you have?

19 MS. MITCHELL-TOMBRAS: 30 seconds.

20 THE COURT: Just do it.

21 There will be a transcript anyway.

22 Go ahead.

23 Q Earlier you mentioned that for transactions under a
24 certain threshold, consumers tend to use debit, is that
25 correct?

Mitchell/Cross/Brenner

1 A That's correct.

2 Q What was that threshold?

3 A It's below \$300 essentially.

4 Q And if a transaction is over that threshold, what type of
5 payment form do consumers tend to use?

6 A They rapidly switch to credit cards.

7 MS. MITCHELL-TOMBRAS: Thank you.

8 No further questions, your Honor.

9 THE COURT: Mr. Brenner, cross-examination.

10 Can you do the cross that is sealed first?

11 MR. BRENNER: Yes, I will start with that.

12 THE COURT: Thank you very much.

13 MR. BRENNER: May I approach, your Honor?

14 THE COURT: Yes, you may.

15 You may proceed.

16 CROSS-EXAMINATION

17 BY MR. BRENNER:

18 Q Good morning, Mr. Mitchell.

19 My name is Eric Brenner. I represent American
20 Express and I'm going to ask you a few questions this morning.

21 Okay?

22 A Okay.

23 Q And I've handed you a binder just like counsel for the
24 government. It has some additional documents we may look at
25 as well as the transcript of your deposition testimony in this

Mitchell/Cross/Brenner

1 case.

2 Okay?

3 A Okay.

4 Q [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 A [REDACTED]

17 Q [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 A [REDACTED]

23 Q [REDACTED]

24 [REDACTED]

25 A [REDACTED]

Mitchell/Cross/Brenner

1 Q [REDACTED]
2 [REDACTED]
3 A [REDACTED]
4 Q [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 A [REDACTED]
10 Q [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 A [REDACTED]
17 Q [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 A [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Mitchell/Cross/Brenner

1 Q [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 A [REDACTED]
5 Q [REDACTED]
6 A [REDACTED]
7 Q [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 A [REDACTED]
11 Q [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 A [REDACTED]
19 Q [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 A [REDACTED]
23 Q [REDACTED]
24 [REDACTED]
25 [REDACTED]

Mitchell/Cross/Brenner

1 A [REDACTED]

2 Q [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 A [REDACTED]

6 Q [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 A [REDACTED]

10 Q I want to just explore this is a little bit more.

11 If you can look at Defendant's Exhibit 6515 which is
12 in your binder.

13 A Okay.

14 Q This is a declaration that Mr. Michael Cooke of Walmart
15 Stores filed in MDL 1720 litigation. It's called objections
16 to the proposed settlement.

17 Just to be to be clear, I'm not interested in
18 offering this for the truth but there are some issues
19 mentioned that I'd like to get your perspective on if I could.

20 If you would look at paragraph 29.

21 Your Honor, I've been asked to switch the feed to
22 our table if possible.

23 THE COURT: Surely.

24 Q Do you see there is a reference in paragraph 29 to the
25 Visa product eligibility service and the Mastercard product

Mitchell/Cross/Brenner

1 validation service?

2 Do you see that?

3 A Yes.

4 Q You are familiar with those services?

5 A No, I'm not.

6 Q You are not familiar that Visa and Mastercard have
7 services that allow merchants to determine the type of card
8 the consumers present at the point of sale prior to
9 authorizing sales transaction or having the transaction
10 completed?

11 A No.

12 Q Let's take a look at paragraph 30 then.

13 I will represent to you that that's what those
14 services are.

15 Assuming I'm right, if we take a look at paragraph
16 30, you can see that in this declaration Mr. Cooke states that
17 these services, again, assuming I'm right about what they are,
18 these services identify a specific card at the point of sale
19 without actually authorizing the transaction.

20 Do you follow what I mean?

21 A Yes.

22 Q Mr. Cooke says that these services would slow down the
23 checkout process and create a negative shopping experience.

24 Then in paragraph 31, then he goes on to talk about
25 the implications for Walmart, which are not expressed in here.

Mitchell/Cross/Brenner

1 Then in paragraph 31, he goes on to talk about the
2 possibility for delays at the checkout and increased costs,
3 inconvenience, consumer dissatisfaction and lost productivity.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 MS. MITCHELL-TOMBRAS: Objection, your Honor,
11 foundation and hearsay to reading the statement into the
12 record.

13 MR. BRENNER: I'm not sure --

14 THE COURT: I'm going to allow him to answer the
15 question.

16 A [REDACTED]
17 [REDACTED]

18 Q [REDACTED]

19 A [REDACTED]

20 Q [REDACTED]

21 A [REDACTED]

22 Q [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

Mitchell/Cross/Brenner

1 A [REDACTED]
2 Q [REDACTED]
3 [REDACTED]
4 A [REDACTED]
5 Q [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 A [REDACTED]
10 Q [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 A [REDACTED]
18 Q [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 A [REDACTED]
22 Q [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Mitchell/Cross/Brenner

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 A [REDACTED]
9 Q [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 A [REDACTED]
16 Q [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 A [REDACTED]
20 Q [REDACTED]
21 A [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 Q [REDACTED]

Mitchell/Cross/Brenner

1 [REDACTED]

2 [REDACTED]

3 A [REDACTED]

4 Q [REDACTED]

5 [REDACTED]

6 A [REDACTED]

7 [REDACTED]

8 Q [REDACTED]

9 [REDACTED]

10 A [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 Q [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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25 [REDACTED]

Mitchell/Cross/Brenner

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Q [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A [REDACTED]

MR. BRENNER: Your Honor, I'm done with the section
that requires a closed courtroom.

THE COURT: Then I have a question.

[REDACTED]

Mitchell/Cross/Brenner

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 THE WITNESS: [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 THE COURT: [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 THE WITNESS: [REDACTED]
20 THE COURT: [REDACTED]
21 [REDACTED]

22 THE WITNESS: [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Mitchell/Cross/Brenner

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[REDACTED]

[REDACTED]

THE COURT: Any other questions on that subject from either side so we don't have to go back to the direct --

MS. MITCHELL-TOMBRAS: No, your Honor.

THE COURT: -- under seal.

MS. MITCHELL-TOMBRAS: No, your Honor.

THE COURT: Nothing.

MR. BRENNER: Nothing.

THE COURT: Okay, we are going to reopen the courtroom.

The overflow room should be reopened.

About how much cross-examination do you have?

MR. BRENNER: Maybe 20 minutes, your Honor. I don't think it's very much.

(End of sealed transcript.)

Mitchell/Cross/Brenner

1 THE COURT: All right.

2 Just for planning purposes, we'll complete the
3 questioning of this witness including any redirect and then
4 we'll have the offering of exhibits then we'll take a break
5 and then we'll have the next witness after that.

6 Okay. We're ready to go.

7 Mr. Brenner, go forward.

8 Q Thank you, your Honor.

9 So let's return to the Official Payments Amex
10 relationship?

11 A Okay.

12 Q Let me start by just reorienting ourselves to make sure I
13 understand the Official Payments business model as you
14 described it.

15 If I got it right, you essentially facilitate these
16 electronic transactions for a variety of entities like the
17 IRS, state and local government and higher education
18 institutions, correct?

19 A Yes.

20 Q And these in many cases are entities that can't accept
21 credit cards but for this convenience fee model, right?

22 A That's correct.

23 Q In other words -- why don't you tell us why is that?

24 A In many cases these are mandatory payments like taxes and
25 the taxing authority has to collect 100 percent of the tax

Mitchell/Cross/Brenner

1 due. And they also don't have any way to essentially mark up
2 those taxes to cover the cost of the transaction.

3 Q In other words, you have to pay your full bill to the IRS
4 and they want 100 percent of the money and they are not going
5 to then take some slice of that and pay it off to a debit card
6 processor or a credit card company, right?

7 A Right.

8 Q So companies like yours essentially opened up this market
9 for credit cards where credit card payment was not otherwise
10 possible, right?

11 A That's correct.

12 (Continued on next page.)
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1 CROSS-EXAMINATION (CONT'D.)

2 BY MR. BRENNER:

3 Q You told counsel for the government that you give your
4 clients, the billers as you refer to them, the option of
5 including American Express or not, right?

6 A That's right.

7 Q They can choose which card products to offer to their
8 customers as part of the product package?

9 A That's correct.

10 Q And you also said that price, the convenience fee can
11 depend upon whether or not Amex is part of the mix or not,
12 right?

13 A Right.

14 Q And your clients, these billers, do not always choose the
15 option of offering American Express, right?

16 A Right.

17 Q And the decision of whether American Express is part of
18 or excluded from the card product package is made daily on a
19 client by client basis, right?

20 A Right.

21 Q And you would agree that non-acceptance of American
22 Express could be a rational business decision depending upon
23 the client, right?

24 A Right.

25 Q You said I think -- maybe you didn't, but if I understand

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1 correctly, you've been with Official Payments since at least
2 2004, is that right?

3 A Right, as part of the acquisition, right.

4 Q And American Express has been accepted even longer than
5 that, right?

6 A Right.

7 Q And you agree that Official Payments' business
8 relationship with American Express has been successful from
9 Official Payment's point of view, right?

10 A That's correct.

11 Q And you noted, for example, that American Express
12 Cardmembers are more affluent and tend to pay more money, I
13 think were your words, right?

14 A They tend to have higher bills.

15 Q And they tend to be more affluent you said, right?

16 A Right.

17 Q And, for example, why don't we look at DX 7824.

18 A 7824 you said?

19 Q Yes.

20 MR. BRENNER: This is a document that was produced
21 to us by the Department of Justice in this case from the files
22 of the IRS. As you can see, the Bates number on the bottom
23 right -- I note that just because this was the form we got the
24 document in -- you can see that particularly as we move along,
25 for whatever reason in the copying process the bottom parts of

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1 certain pages were cut off. Luckily I want to talk about the
2 top parts, so the information I'm interested in is there.

3 Obviously if there's a better version of this, Your
4 Honor, that we can get from the government, we can replace it
5 in the record so there's a complete copy.

6 But for present purposes Mr. Mitchell, let's just
7 focus on the top part of the first page.

8 THE COURT: Are there redactions in this document or
9 is it being presented in its original form?

10 MR. BRENNER: I believe the numbers in this document
11 are confidential. It's not our document. (Pause.)

12 It's okay to show. We have a redacted version we're
13 showing.

14 THE COURT: All right. Go ahead.

15 Q You can see that this is a document, Mr. Mitchell,
16 looking at the overview, that reflects payments that were
17 processed through the Official Payments credit and debit IVR
18 and internet systems for federal tax payments for the May
19 through December 2010 period.

20 See where it says that?

21 A Yes.

22 Q And if you look on the third page of this document,
23 which is Bates ending 239, the fourth bullet down, you see
24 there's a description there of the average tax payments
25 through Official Payments on the various -- by virtue of

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1 various payment forms?

2 A Yes.

3 Q And you can see the number for American Express, I'm not
4 going to say it in court because we're trying not to use
5 numbers for confidentiality reasons; you see the American
6 Express number on the first line and then the MasterCard,
7 Discover and the Visa numbers on the pages -- on the lines as
8 you work your way down?

9 A Yes.

10 Q You can see that American Express's average transaction
11 size is significantly higher than the other three networks; is
12 that right?

13 A That's right.

14 Q If you look at the next page, sir, you see there's a
15 reference on the top of the page to high balance transactions
16 which I think is also something you mentioned during your
17 direct testimony; these are transactions, federal tax payments
18 of more than \$100,000, is that right?

19 A That's right.

20 Q Okay. And again I don't want to say the numbers but the
21 second bullet on this page, which is Bates ending 240, shows
22 the percentage of high balance payments captured by American
23 Express versus the other networks?

24 A Yes.

25 Q And American Express has the overwhelming majority of

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1 such payments, right?

2 A That's right.

3 Q In fact, American Express offers Official Payments a
4 lower rate for these high balance transactions, correct?

5 A They do.

6 Q And because American Express charges you less, you are
7 able to offer a lower convenience fee to American Express or
8 to cardmembers for high balance transactions, right?

9 A We can.

10 Q In other words, I don't want to get into the numbers, but
11 Official Payments's cut, if you want to use that term loosely,
12 remains the same because there's a lower rate that offsets the
13 lower convenience fee, American Express gets less because
14 their convenience fee is lower but cardmembers are
15 incentivized to make these types of high balance transactions,
16 right?

17 A Right.

18 Q And that's obviously good for Official Payments, right?

19 A Right.

20 Q You're familiar with American Express's Pay with Points
21 program as well, sir?

22 A Yes.

23 Q And under this program American Express Cardmembers can
24 redeem Membership Reward points to offset the convenience fees
25 that Official Payments charges them, right?

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1 A That's right.

2 Q So, rather than having to come out-of-pocket to make a
3 credit card payment of their federal tax liability, if they've
4 got Membership Rewards points stored up, they can just pay
5 that way and not have to pay any money, right?

6 A Right.

7 Q And Official Payments has told the IRS that this Pay with
8 Points program is one of the most successful value added
9 offers Official Payments has implemented to encourage usage of
10 the site by offsetting the convenience fee, right?

11 A That's correct.

12 Q Okay. And there have been tens of millions of American
13 Express Membership Reward points redeemed as part of this
14 program, right?

15 A I would expect. I believe so. I don't know what the
16 number is. I'm sure it's been used.

17 Q You would agree that it was a successful program,
18 right?

19 A It was. It's no longer in effect but it was.

20 Q Okay. American Express has expanded the program so you
21 can pay federal tax liabilities?

22 A They did.

23 Q Which means as opposed to simply paying a convenience
24 fee, I can actually pay my federal tax bill with Membership
25 Rewards points that I've stored up or offset part of my tax

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1 bill, right?

2 A Right.

3 Q Okay. So, under this payment OPC gets its convenience
4 fee, right, just like always?

5 A Right.

6 Q But American Express Cardmembers are given a new
7 incentive to use their credit card for tax payments, right?

8 A Right.

9 Q Okay. And, again, this benefits Official Payments,
10 right?

11 A That's right.

12 Q You talked about the Choice Pay site. Let me ask you a
13 few questions about that. You said, I think I've got it
14 right, that the Choice Pay site was created because, in your
15 words, the associations had rules that prevented having
16 different convenience fees on a single site?

17 A For the same -- for competitive card types.

18 Q So, different convenience fees for Visa versus MasterCard
19 versus American Express or Discover?

20 A Credit cards.

21 Q I just want to focus on your choice of the word
22 "associations." You're aware that Visa regulations continue
23 to prohibit convenience fees that are not applicable to all
24 forms of payment accepted in the payment channel, right?

25 A In the tax base it's no longer the case, there are

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1 service fees and there is a lot more flexibility on how
2 they're offered and displayed.

3 Q Are you aware of whether or not the federal government's
4 consent decree with Visa and MasterCard in this case covered
5 convenience fees?

6 A I don't understand your question.

7 Q If you don't understand the question, then you probably
8 don't know the answer either so I'll move on.

9 A Yeah.

10 Q You talked about the negotiations with American Express
11 regarding the Choice Pay site?

12 A Right.

13 Q And I think you described them as difficult and you said
14 that there was a termination letter that was sent during the
15 negotiations.

16 So, just to make sure I'm clear on the context;
17 From its inception, Official Payments was allowed to run
18 the Choice Pay site without American Express on it up
19 through whatever year they'll join, at this point 2015,
20 notwithstanding anything in American Express's rules, right,
21 you ran the Choice Pay site.

22 A We did.

23 Q And as early as 2012 American Express started making
24 efforts to get on the Choice Pay site by offering a lower
25 price to Official Payments, right?

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1 A That's right.

2 Q And the parties could not reach, I think the way you said
3 it in deposition was, the two sides could not come to business
4 terms on rates, right?

5 A That's right.

6 Q I don't want to get into the particulars of rates because
7 of confidentiality issues but last summer Choice Pay and
8 American Express did agree to a rate that would allow American
9 Express to be on the Choice Pay site, correct?

10 A That's right.

11 Q Okay. And that rate was actually lower than rates they
12 had previously offered to Official Payments, right?

13 A Right.

14 Q So, over the course of these negotiations beginning at
15 least back in 2012, as I understand it, American Express
16 lowered its rate to try to gain acceptance on the Choice Pay
17 site, right?

18 A That's right.

19 Q In the final agreement American Express also agreed to
20 pay Official Payments marketing funds as part of the deal that
21 got American Express on the Choice Pay site, correct?

22 A That's correct.

23 MR. BRENNER: Your Honor, I failed to offer into
24 evidence DX 7824, that's the document with copying problems.
25 So, I would propose offering it now but replacing it if

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1 there's a better copy available from the Department of
2 Justice.

3 MS. MITCHELL-TOMBRAS: Your Honor, no objection.
4 We'll work with defense.

5 THE COURT: All right. DX 7824 is received into
6 evidence.

7 (Defendant's Exhibit 7824 so marked in evidence.)

8 THE COURT: You read from DX 6515.

9 MR. BRENNER: I defer to Your Honor. Again, I
10 wasn't offering it for the truth but if you want for
11 completeness.

12 THE COURT: I just think if it is not offered for
13 the truth, that it shouldn't be a problem and I just want to
14 preserve the record for appellate review. Is there any
15 objection --

16 MS. MITCHELL-TOMBRAS: No objection.

17 THE COURT: -- for the limited purpose of providing
18 it in the record for appellate review?

19 MS. MITCHELL-TOMBRAS: No objection, Your Honor.

20 THE COURT: All right. DX 6515 is received for that
21 limited purpose.

22 (Defendant's Exhibit 6515 so marked in evidence.)

23 THE COURT: All right.

24 Q I want to talk about debit now, Mr. Mitchell, and you
25 were asked by counsel for the government about whether or not

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1 there's a threshold where you see people are more or less
2 interested in using debit, remember that?

3 A Yes.

4 Q And you said that it was skewed for debit below the \$300
5 threshold, right?

6 A That's right.

7 Q And it changes once you get above the \$300 threshold,
8 right?

9 A Right.

10 Q You were deposed in this case in December 2012, are you
11 aware of that?

12 A Yes.

13 Q Approximately a year and a half ago, right?

14 A Right.

15 Q And you were asked the same question by counsel for the
16 government during that deposition about whether or not there's
17 a certain threshold in which a customer would prefer to use a
18 credit card rather than a debit card and what you said then
19 was that in your business it's roughly \$250, do you remember
20 saying that?

21 A Yes.

22 MS. MITCHELL-TOMBRAS: Your Honor, I'm sorry, could
23 he give line and page.

24 MR. BRENNER: Sure, my apologies.

25 THE COURT: Good idea.

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1 MR. BRENNER: I'm looking now at page 29, line
2 three, for the rest of that page.

3 THE COURT: And that's at the deposition of this
4 witness?

5 MR. BRENNER: In this case, Your Honor.

6 THE COURT: In this case.

7 MR. BRENNER: United States against Amex.

8 THE COURT: In December 2012?

9 MR. BRENNER: Right.

10 Q So, a year and a half ago your sworn testimony was that
11 the threshold in terms of a decision using the credit versus a
12 debit card was \$50 less than it is today, correct?

13 A That's right.

14 Q And if we go back and look at DX 7824, that was the
15 document with the average transaction sizes for the 2010 time
16 period, do you remember that?

17 A That's right.

18 Q And if you look at the third page of this document, Bates
19 ending 239, and you go back to that fourth bullet where we
20 were before, looking at average payment size, three different
21 credit card networks, you see there's also an average PIN-less
22 debit card payment figure?

23 A Yeah.

24 Q And you see that that number is higher than \$300,
25 right?

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1 A Yeah, this is specific to the IRS business though, so
2 again this is not our whole business portfolio. The number I
3 was talking about earlier was much broader than the IRS.

4 Q So, for the entire portfolio, the number you said at your
5 deposition a year and a half ago was \$50 lower than it is
6 today, correct?

7 A That's right.

8 Q And for the IRS portfolio, the number you were reporting
9 to the IRS back in 2010 is higher than the threshold you
10 identify today, right?

11 A That's correct, tax payments are higher. Tax payments
12 are a small portion of our overall business.

13 Q About a third right?

14 A About a third.

15 Q We've heard a lot in this case about the Durbin Amendment
16 and how it regulated debit fees and there was reference to
17 that in the document you were looking at earlier today, and
18 just to be express about it, Official Payments is one of the
19 merchants whose debit rates fell as a result of the Durbin
20 Amendment, right?

21 A That's right.

22 Q And OPC wants to move people from credit to debit as a
23 consequence of that rate difference, I think there was a slide
24 I saw in PX 1337 that -- A, 1337-A that we were looking at
25 earlier that talked about driving every transaction towards

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1 debit cards, right?

2 A Right.

3 Q That that's something that is Official Payment's goal,
4 correct?

5 A Right.

6 Q And prior to the Durbin Amendment passing, the Official
7 Payments site was very focused on credit and used words like
8 use your credit card here and then after Durbin you added
9 specific language around debit cards and you gave consumers
10 the choice of entering their debit card, right?

11 A Right.

12 Q And you have been successful in moving some people from
13 credit to debit, right?

14 A Some.

15 Q And I think we saw on one of the documents we were
16 looking at earlier that you offer a flat fee for Visa debit
17 transactions, right?

18 A That's right, in the tax base we do.

19 Q So, it is a \$3.95 flat fee if you want to pay your
20 federal tax liability with a Visa debit card, correct?

21 A That's correct.

22 Q And you implemented that fixed debit rate for Visa debit
23 transactions before the Durbin Amendment, right?

24 A That's right.

25 Q And there have been no changes to the debit rate you

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1 offer consumers in the federal tax base after the Durbin
2 Amendment, right?

3 A Next year there will be.

4 Q But from when Official Payments started paying lower
5 debit rates because of the Durbin regulation?

6 A Yeah, so the \$3.95 was a requirement for Visa. The
7 reason it was there was because Visa required it as part of
8 their rules, convenience fee and rules in tax.

9 Q And so, until you change it next year you have been
10 paying lower fees to debit -- for debit to Visa based upon
11 Durbin but the flat rate for consumers has been the same if
12 they pay with Visa debit, correct?

13 A That's right. The cost structure in tax makes \$3.95
14 marginally workable for us.

15 Q One question, you've talked about your -- additional
16 question, you've talked about your desire to steer through a
17 variety of different methods. I don't want to go into the
18 particulars because we no longer have a closed courtroom but
19 let me just explore one more issue on this.

20 You said that one of the ways people come to your
21 site is because the card associations will advertise this
22 payment service and these capabilities to their cardholders,
23 right.

24 A That's right.

25 Q In other words, there have been marketing partnerships

1 that Official Payments has had with card networks such as
2 American Express, right?

3 A Right.

4 Q And proprietary websites for cardmembers like American
5 Express talk about the fact that Official Payments and others
6 like it can do this to try to induce people to come to your
7 site, correct?

8 A Right.

9 Q And Official Payments and American Express have put out
10 advertising in the past together, right?

11 A Yes.

12 Q So, if someone is attracted to your site based upon an
13 American Express promotion and then they start entering in
14 their American Express Card information for payment, you would
15 then, under the various methods you've described for steering
16 or otherwise, be interested in steering that American Express
17 Card member to some other payment form that is cheaper to
18 Official Payments, right?

19 A Probably not.

20 Q How would you know how they got to the website, based on
21 a newspaper ad?

22 A Because the way we advertise and the way they would enter
23 the URL, for example, would be very specific to that
24 advertisement or the redirect from wherever they came from and
25 we would have a very, very good idea of where they came from

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1 and how they got to us.

2 Q You know that not every single American Express
3 Cardmember who learns about Official Payments from American
4 Express is going to come from an American Express URL, right,
5 they could just Google you after hearing about you a day, a
6 week, a month before, right?

7 A That's right.

8 Q And in that instance you would have no way of knowing
9 whether or not the American Express Cardmember had been
10 attracted to your website based upon an American Express
11 promotion, right?

12 A That's correct.

13 Q And you would have no way to not steer the American
14 Express Cardmember in that instance, right?

15 A That's right.

16 MR. BRENNER: No further questions, Your Honor.

17 THE COURT: Anything else?

18 MS. MITCHELL-TOMBRAS: Yes, Your Honor, just a few
19 minutes.

20 THE COURT: Please.

21 REDIRECT EXAMINATION

22 BY MS. MITCHELL-TOMBRAS:

23 Q Mr. Mitchell, following up on the last question that was
24 asked, what does Official Payments -- what benefit to
25 customers does Official Payments hope to provide by offering

Mitchell/Redirect/Mitchell-Tombras

1 different price options on the check-out page?

2 A For the consumer who is coming to us as a general shopper
3 who has a tax bill or a liability of some kind that they need
4 to pay, our goal is to offer them the lowest cost service
5 possible for the particular way they choose to make that
6 payment.

7 Q If they want to pay with a higher cost rewards card, how
8 does Official Payments feel about that?

9 A That's their choice, we don't have a problem with that.

10 Q You testified that some billers don't always choose Amex;
11 is that correct?

12 A That's correct.

13 Q Does Official Payments typically obtain new clients
14 through an RFP process?

15 A We do.

16 Q Can you describe how that process typically works?

17 A The biller will issue a request for proposal, we will
18 respond to it with our capabilities, our technology and the
19 information that we would provide as part of a normal RFP
20 response as well as a pricing structure that would offer to
21 that particular biller pricing based on the card mix,
22 different card mix capabilities that we have.

23 Q And you offer the client different prices based on which
24 credit card networks are included?

25 A Yes.

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1 Q And how do those prices differ based on the portfolio of
2 credit?

3 A They're lower -- if it is a debit only type process, it
4 is lower. If it includes Visa and MasterCard credit, it's
5 higher. If it includes American Express, it is higher.

6 Q As a result, what decision do some billers make?

7 A Sometimes they choose not to include American Express.
8 Sometimes they choose debit only.

9 Q If Official Payments was allowed to differentially price
10 different credit transactions, would that change clients'
11 incentives to accept American Express?

12 A It might. It likely would. They wouldn't have to make a
13 choice, they would allow their consumers to make the choice
14 because they would see the different prices themselves and
15 choose to use a higher rewards card or not.

16 Q The way that the rules work now, if a client were to
17 accept American Express, how would that impact the prices that
18 customers who use the less expensive credit cards pay?

19 A They would all have to pay the same rate.

20 Q You mentioned earlier that you're familiar with the term
21 "mandatory payments"?

22 A Yes.

23 Q Is it unique in the federal tax base that there are three
24 processors?

25 A It's relatively unique. Normally we have a direct

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1 relationship with our client and we're the only ones
2 providing the service or one of our competitors would be
3 the only one providing the service to their particular
4 clients.

5 Q Outside the federal tax base it's typical to have one
6 processor?

7 A Yes.

8 Q And most of the clients are in the mandatory payments
9 business?

10 A Yes, they are.

11 Q So, if your clients outside of the federal tax base don't
12 accept your preferred form of payment, do you have another
13 option if you want to pay by credit or debit card?

14 A Well, you could. I mean you can either use a different
15 card type that we offer or you can follow a more traditional
16 path and mail in a check or go to the office and pay.

17 Q If you want to pay with your preferred type of card
18 that's not accepted, can you pay your bill to the county next
19 to you?

20 A No.

21 Q You were asked some questions about the Pay with Points
22 program, do you recall that?

23 A Yes.

24 Q Is that still a program between American Express and
25 Official Payments?

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1 A Not in the way it was back in 2010. In 2010 the taxpayer
2 actually had the choice online of their payment transaction
3 while they were on our site to use points to pay. American
4 Express took that program, canceled it with us and now
5 essentially you go to the American Express site and offset any
6 kind of transaction on your bill, whether it's a tax payment
7 or grocery store or whatever, with points.

8 THE COURT: So, it is not directly to you?

9 THE WITNESS: Right.

10 THE COURT: It's a program where when you get your
11 American Express bill, you pay part of the bill with your
12 points?

13 THE WITNESS: That's exactly right.

14 THE COURT: What is the impact on you as a
15 merchant?

16 THE WITNESS: Well, it makes it a lot harder for our
17 consumers to take advantage of the program. Previously it was
18 something that we offered online in the check-out and now
19 essentially all we can do is point the cardmember to the
20 website that explains it on American Express's own site and
21 then they just have to wait on their bill to come in -- they
22 have to go ahead and make the full payment, wait on their bill
23 to come in and then offset the cost of the transaction.

24 So, it's far less convenient and we actually have no
25 idea how many taxpayers are taking advantage of it anymore.

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1 THE COURT: And so, if someone on your site decides
2 to utilize the American Express Card, do you advise the member
3 that they may be able to pay with points at the other end when
4 they get their bill?

5 THE WITNESS: We didn't last year but we will going
6 forward.

7 Q To your knowledge, do other credit card networks offer
8 incentives to pay their tax liability or convenience fee with
9 points or other kinds of rewards from their cards?

10 A Not in the manner that we were talking about with
11 American Express earlier. They do have offers similar to
12 American Express where you can offset charges on your monthly
13 bill with points.

14 Q Is Official Payments interested in the way that we
15 described that we won't go into detail here in the open
16 court, interested in providing customers with a range of
17 lower price card options?

18 A Yes.

19 Q Both credit and debit options?

20 A Yes.

21 Q Why is that?

22 A Again, just to offer them choices, they can make their
23 own choice as to whether they want to use their rewards card
24 or not or if it is more important for them at that moment in
25 time to save some money.

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1 MS. MITCHELL-TOMBRAS: Thank you, Mr. Mitchell. No
2 further questions.

3 THE COURT: Mr. Brenner, anything else?

4 MR. BRENNER: One document on the question you
5 asked, Your Honor, that may help clarify what they do, if I
6 may.

7 THE COURT: Sure.

8 RECROSS-EXAMINATION

9 BY MR. BRENNER:

10 Q Mr. Mitchell, if you can look at my book to DX 7431.

11 A Okay.

12 Q And this is a printout of the Official Payments -- or at
13 least one page of the Official Payments website, correct?

14 A Right.

15 Q And you can see based upon the date at the bottom, we
16 printed this out June 2014?

17 A Okay.

18 Q Would you agree that this represents what is currently on
19 the Official Payments website?

20 A Yes.

21 Q And you can see here this page talks about special offers
22 and in particular how you can use your American Express Card
23 to pay your federal, state and local taxes through Official
24 Payments, then it goes on to talk about click here to learn
25 more about how you may be able to use Membership Reward points

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1 towards your federal tax payment and convenience fee?

2 A Right.

3 Q This is what's on the Official Payments website?

4 A Right. This was added after the end of April 15th's tax
5 peak.

6 MR. BRENNER: Your Honor, I would move DX 7431 into
7 evidence.

8 MS. MITCHELL-TOMBRAS: No objection, Your Honor.

9 THE COURT: All right. And I notice here there's a
10 reduced fee offer for federal payments over \$100,000.

11 THE WITNESS: That's right.

12 THE COURT: I'd like to know how often is that
13 utilized.

14 THE WITNESS: It's surprising but it's utilized
15 more than you would expect. We do gets lots of large tax
16 payments.

17 THE COURT: I see. That's outstanding. We like to
18 keep the lights on here.

19 MR. BRENNER: I think it is actually in the
20 document we entered, Your Honor. I'm not remembering what
21 the DX number is without my full outline up here. It does
22 actually identify how many such transactions there are. It
23 is the document where we had copying problems if you're
24 interested.

25 THE COURT: All right. I'll read it with great

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1 interest.

2 DX 7431 is received in evidence.

3 (Defendant's Exhibit 7431 so marked in evidence.)

4 THE COURT: Anything else from the government?

5 MS. MITCHELL-TOMBRAS: No, Your Honor.

6 THE COURT: All right.

7 Mr. Mitchell, you're excused.

8 THE WITNESS: Thank you.

9 THE COURT: Stay healthy.

10 THE WITNESS: I will.

11 THE COURT: Okay.

12 MR. BRENNER: Thank you.

13 (Witness steps down.)

14 THE COURT: Mr. Conrath.

15 MR. CONRATH: Your Honor, Ms. Musser will be
16 handling the documents.

17 THE COURT: Oh, the documents.

18 Ms. Musser, go forward with the documents.

19 MS. MUSSER: As a preliminary matter, Your Honor,
20 we have about six binders that contain copies of documents
21 that we're happy to give the Court.

22 Alternatively, I think we'll only need to discuss in
23 any detail two documents.

24 THE COURT: Okay. Well, I take it there's no
25 controversy about the six binders full of documents.

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1 MS. MUSSER: No, Your Honor. I think after talking
2 with Mr. Orsini this morning we'll want to clarify two
3 documents for the record but other than that, I don't
4 anticipate any disagreement.

5 MR. ORSINI: Your Honor, Kevin Orsini.

6 That's sort of right but not entirely right.
7 There are two documents where, as I'm sure Ms. Musser is
8 going to explain -- the vast majority we've stipulated, we
9 have no objection. There were a small number of documents
10 where there were within these American Express documents
11 hearsay statements of third parties and what I said to the
12 government last night in a letter was as long as those
13 statements are not being offered to prove the truth of the
14 matter asserted in the hearsay statements, we have no
15 objection, and I understand Ms. Musser is going to cover that
16 and they're not offering it for those purposes. So, those
17 documents, there's no issue about them.

18 Then there's the remaining category of roughly five
19 or six documents which reflect survey data similar to a lot of
20 the survey data Your Honor has already ruled on. We are
21 objecting to that survey data as we have with the other
22 surveys to preserve our objections subject to Your Honor's
23 rulings earlier in the trial.

24 THE COURT: Thank you.

25 MS. MUSSER: Your Honor, if I may?

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1 THE COURT: Yes, you may.

2 MS. MUSSER: Your Honor, for your reference I have
3 handed the Court what's been marked as PX 2769. This contains
4 exhibits that Mr. Orsini included in his letter to the Court
5 yesterday evening with the exception of four, there are four
6 exhibits, PX 0221--

7 THE COURT: Wait. Are they on this list?

8 MS. MUSSER: No, they're not. Those are four
9 documents Mr. Orsini included on his list yesterday that have
10 been admitted into evidence already.

11 THE COURT: Do we have his letter?

12 MS. MUSSER: I have his letter, Your Honor. I can
13 also admit that into evidence.

14 (Pause.)

15 THE COURT: Go ahead.

16 MS. MUSSER: All right, Your Honor.

17 So, PX 2769 contains all the exhibits listed in
18 PX 2767 attached to Mr. Orsini's letter except for four
19 exhibits which are PX 0221, PX 0770, PX 1099 and PX 1101.
20 These documents were admitted into evidence on Monday,
21 August 11th and so we did not include them on PX 2769 in the
22 list of documents to be admitted today.

23 THE COURT: All right. So, those four documents are
24 already admitted?

25 MS. MUSSER: Correct.

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1 MR. ORSINI: That's right. They've been taken off
2 this list because they're already in. We had no objection at
3 that time.

4 THE COURT: Right. So, let's talk about the
5 documents on the list.

6 MS. MUSSER: Your Honor, looking at Exhibit A which
7 is the first page of 2769, our understanding is there are no
8 objections to moving these into evidence, so we propose to
9 move these into evidence en masse for the convenience of the
10 Court and we move to admit the exhibits listed in Exhibit A
11 into evidence.

12 THE COURT: All right.

13 MR. ORSINI: Your Honor, as I stated earlier, we
14 don't have an objection. The way we were able to resolve this
15 issue was the government agreed to provide us with some detail
16 about in good faith the sections of those documents they
17 currently anticipate citing in their post-trial submission so
18 that we had some fair notice as to what these documents might
19 be used for.

20 THE COURT: All right. First of all, I'm going to
21 admit PX 2769 which is your cover letter attaching Exhibits A,
22 B and C.

23 The exhibits on Exhibit A to Exhibit PX 2769 are
24 received in evidence without objection.

25 (Plaintiff's Exhibits 2769 and the exhibits listed

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1 on Exhibit A therein so marked in evidence.)

2 As to Exhibit B.

3 MS. MUSSER: Your Honor, on Exhibit B we are not
4 offering for the truth of the matter PX 0226, PX 0450,
5 PX 1057, PX 1074 and PX 1167 for the truth of the matter
6 asserted. With that understanding, we offer those exhibits
7 into evidence.

8 THE COURT: All right. PX 0226, PX 0450, PX 1057,
9 PX 1074 and PX 1167 are received in evidence with the
10 stipulation that you've just articulated.

11 MR. ORSINI: No objection, Your Honor.

12 (Plaintiff's Exhibits 0226, 0450, 1057, 1074, 1167
13 so marked in evidence.)

14 THE COURT: Okay. What about the other two?

15 MS. MUSSER: Your Honor, just to clarify for the
16 record, there are -- Mr. Orsini and American Express
17 identified particular pages within these documents that
18 contained hearsay. Our understanding is those pages are not
19 offered for the truth of the matter asserted but other pages
20 within the document that were not identified by Mr. Orsini and
21 American Express are offered for the truth of the matter
22 asserted.

23 THE COURT: Is this as to those other two exhibits
24 or as to the ones that I just admitted?

25 MS. MUSSER: The ones you just admitted.

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1 THE COURT: All right. I understand that.

2 MR. ORSINI: That's accurate, Your Honor.

3 THE COURT: All right.

4 MS. MUSSER: Your Honor, if I may approach with
5 PX 0690 and copies of PX 1209.

6 THE COURT: All right.

7 (Pause.)

8 MS. MUSSER: Turning to PX 0690.

9 THE COURT: Yes.

10 MS. MUSSER: Looking at the line starting: "In
11 recent years," this is below the: "Please note Southwest
12 counterpoints."

13 THE COURT: I'm sorry, in the middle of the first
14 page?

15 MS. MUSSER: In the middle of the first page, the
16 second bullet point that starts: "In recent years Amex."

17 THE COURT: Yes.

18 MS. MUSSER: We are not offering that sentence for
19 the truth of the matter asserted. With that stipulation, we
20 offer the document for the truth of the matter asserted with
21 the exception of that sentence into evidence.

22 MR. ORSINI: Your Honor, that doesn't quite address
23 our objections actually. All of those bullet points in that
24 section are summarizing or at least purport to be summarizing
25 counterpoints from Southwest Airlines, an entity that is

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1 obviously not American Express.

2 For example, in the first one where they're
3 describing a stepped up offering as insignificant, to the
4 extent that the government is offering these bullet points
5 which reflect Southwest statements, that is hearsay and to
6 the extent they want to use those bullet points for the
7 truth of the matters asserted in those bullet points, we do
8 object.

9 MS. MUSSER: Your Honor, we view those as notes that
10 are American Express's understanding of Southwest's position.
11 There's no evidence that those are notes of a meeting or
12 summarize -- or some sort of note taking of Southwest
13 statements and even if they are, we view they are adopted
14 admissions. This is an e-mail from Peggy Sousa to Kim Goodman
15 reporting on her understanding of the Southwest negotiations
16 and to the best of her knowledge.

17 MR. ORSINI: Your Honor, the fact that someone has
18 written down or summarized a statement someone else makes
19 doesn't render it not hearsay. It's also not an adoptive
20 admission simply because you e-mail this statement that
21 someone made to someone else within the business. They had
22 the Southwest witness on the stand, they asked the Southwest
23 witness questions about their position. That's the
24 appropriate vehicle for getting in Southwest's perspective on
25 a particular offer that was or was not made, not pointing

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1 to --

2 THE COURT: Yes, I agree with you. And if they want
3 to bring back someone from Southwest to talk about this on the
4 rebuttal case, they can.

5 MS. MUSSER: Your Honor, we don't offer this for
6 the truth of the matter asserted.

7 THE COURT: All right. Well, this whole section,
8 the section that starts with: "Please note Southwest
9 counterpoints," that's not being offered for the truth of the
10 matter asserted?

11 MS. MUSSER: No, Your Honor.

12 THE COURT: All right. With that understanding --

13 MR. ORSINI: With that understanding, no objection,
14 Your Honor.

15 THE COURT: With that understanding, PX 0690 is
16 received into evidence. All right.

17 (Plaintiff's Exhibit 0690 so marked in evidence.)

18 MS. MUSSER: Your Honor, turning to PX 1209.

19 THE COURT: Okay. What's the issue here?

20 MS. MUSSER: Your Honor, American Express has
21 identified the pages ending in Bates number 857 to 861 as
22 containing embedded hearsay and those two Bates number, I am
23 referring to the Bates numbers closest to the bottom.

24 THE COURT: I see the Bates numbers but what about
25 it is embedded hearsay?

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1 MR. ORSINI: Your Honor, these pages are a summary
2 of a meeting that American Express had with RBA, Reserve Bank
3 of Australia. There are a variety of statements attributed to
4 American Express executives. We don't object to those, those
5 are obviously admissions, but there are a variety of
6 statements attributed to personnel at the Reserve Bank. To
7 the extent those are being offered for the truth of the
8 matter, we would object to that.

9 MS. MUSSER: Your Honor, we're not offering the
10 statements made by the Reserve Bank officials for the truth of
11 the matter asserted. Our understanding of what we're offering
12 this document for is consistent with Mr. Orsini's statements,
13 we're only offering American Express statements contained in
14 these pages for the truth of the matter asserted.

15 MR. ORSINI: With that understanding, Your Honor,
16 there's no objection from American Express.

17 THE COURT: With that understanding, PX 1209 is
18 received in evidence.

19 (Plaintiff's Exhibit 1209 so marked in evidence.)

20 THE COURT: What else do we have here?

21 MS. MUSSER: Turning to Exhibit C of PX 2769.

22 THE COURT: Yes.

23 MS. MUSSER: We offer the documents contained in
24 Exhibit C into evidence for the truth of the matter asserted.

25 MR. ORSINI: Your Honor, as I noted earlier, these

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1 are documents that contain survey evidence. Your Honor has
2 ruled on these surveys or other surveys earlier in the trial,
3 we understand those ruling, we're not asking Your Honor to
4 readdress those.

5 THE COURT: You're preserving your rights.

6 MR. ORSINI: That's correct, Your Honor.

7 THE COURT: All right. With the understanding that
8 the defense objects to the six exhibits in Exhibit C, I
9 overrule those objections and PX 0044, 0634, 0865, 1110, 1677
10 and 1012 are received in evidence.

11 MS. MUSSER: Thank you, Your Honor.

12 (Plaintiff's Exhibits 44, 634, 865, 1110, 1677, 1012
13 so marked in evidence.)

14 THE COURT: Do we have anything left to discuss over
15 the Labor Day weekend then?

16 MR. CONRATH: No, Your Honor.

17 MR. CHESLER: We might, Your Honor, but it won't
18 have anything to do with the case.

19 THE COURT: All right. Thank you very much. All
20 right.

21 MR. CONRATH: Your Honor, plaintiffs rest.

22 THE COURT: All right. Very well. Thank you.

23 Now we'll take a ten minute break and then we will
24 resume with --

25 MR. CHESLER: Professor Bernheim.

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1 THE COURT: Professor Bernheim. All right. Very
2 well.

3 All right. Before we go, I think Professor Hemphill
4 is here and he'll be with us for the testimony of Professor
5 Bernheim but, of course, Professor Hemphill has already filed
6 his report in the class case.

7 All right. Thank you.

8

9 (Recess taken.)

10 (Continued on next page.)

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1 THE COURT: Please be seated.

2 All right. Anything before we go to the next
3 witness?

4 MR. CONRATH: Nothing from us, Your Honor.

5 THE COURT: We're going to have to break a little
6 early for lunch because I have a criminal matter I need to do,
7 10, 15 minutes, it depends on when they're ready, and then we
8 will resume at 2:00. I can go as late as six tonight, all
9 right, and then all day tomorrow for the balance of the
10 witness' examination, cross-examination, redirect, recross,
11 however we have to deal with it.

12 So, you may call your next witness.

13 MR. CHESLER: We call Professor Douglas Bernheim,
14 Your Honor.

15 THE COURT: Very well.

16 (Witness takes the stand and sworn by the clerk.)

17 B E R T D O U G L A S B E R N H E I M, having been
18 first duly sworn was examined and testified as follows:

19 THE CLERK: Please state your name for the
20 record.

21 THE WITNESS: Bert, B E R T, Douglas, Bernheim,
22 B E R N H E I M.

23 THE CLERK: Please be seated.

24 THE COURT: Mr. Chesler, you may inquire.

25 MR. CHESLER: Thank you, Your Honor.

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1 DIRECT EXAMINATION

2 BY MR. CHESLER:

3 Q Good morning, Professor.

4 A Good morning.

5 Q Dr. Bernheim, by whom are you employed?

6 A I'm employed by Stanford University.

7 Q What position do you hold there?

8 A I have an endowed chair in the Department of Economics,
9 I'm the Edward Ames Edmonds Professor of Economics.

10 Q And as of this fall, will you be taking on any additional
11 responsibilities at the university?

12 A Yes, I will, as of another couple of weeks I'll be taking
13 over as Chairman of the Economics Department.

14 Q At Stanford?

15 A At Stanford, yes.

16 Q Would you look, there should be a book in front of you;
17 I'd like you to look at the first document in the book, it's
18 marked Defendant's Exhibit 6463-A.

19 Do you have that, sir?

20 A I do, yes.

21 Q Would you take a moment to look at that and tell us what
22 that is?

23 A This is my curriculum vitae.

24 Q Is it accurate, as far as you know?

25 A As far as I know, it looks like one that I prepared and I

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1 think that, you know, there are always updates to these things
2 but I believe this is accurate.

3 MR. CHESLER: Your Honor, I offer 6463-A.

4 MR. CONRATH: No objection, Your Honor.

5 THE COURT: Exhibit 6463-A is received in evidence.

6 MR. CHESLER: Thank you.

7 (Defendant's Exhibit 6463-A so marked in evidence.)

8 Q Professor, within the discipline of economics is there
9 any field or are there fields in which you have specialized
10 over the years?

11 A Yes, I'm a microeconomist and in that general field I've
12 worked on a number of different areas, one of which is the
13 field of industrial organization which studies competition
14 between firms within industries. Another area that I've been
15 spending a lot of time working on in recent years is
16 behavioral economics which studies the psychology of economic
17 decision making and I've spent a quite a bit of time studying
18 financial sophistication and financial decision making by
19 consumers as well as phenomena like social influences on
20 economic decision making.

21 Q You mentioned you are a microeconomist; what is the field
22 of microeconomics?

23 A Broadly we divide economics into two branches,
24 microeconomics and macroeconomics. Microeconomics is the
25 study of the individual decision makers in markets.

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1 Macroeconomics is the study of the whole economy.

2 Q For how many years have you been on the faculty at
3 Stanford?

4 A I joined the Stanford faculty originally in 1982 but I
5 haven't been there continuously because I held positions at
6 Princeton University and at Northwestern University, in the
7 business school at Northwestern, the Kellogg School. So,
8 it's been 32 years all together minus six, I guess about 26
9 years at Stanford on the faculty.

10 Q For how many of these six years were you on the faculty
11 of Princeton?

12 A Four.

13 Q For two you were at the business school at Northwestern?

14 A Correct.

15 Q Have you previously testified in judicial proceedings as
16 an expert witness?

17 A I have, yes.

18 Q Approximately how many times, sir?

19 A I actually didn't count. I think it's on the order of
20 six, seven, eight, something like that.

21 Q Have you been accepted as an expert witness in prior
22 judicial proceedings?

23 A Yes, I have.

24 Q In the field of economics?

25 A Yes, I have.

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1 Q Are you also a fellow of the American Academy of Arts and
2 Sciences?

3 A Yes, I am.

4 Q For how long have you been a fellow in the academy?

5 A Oh, it's -- I was elected in the 1990s, it's I think been
6 15, 18 years, something like that.

7 MR. CHESLER: Your Honor, we offer Professor
8 Bernheim as an expert in economics including in the fields of
9 industrial organization economics and behavioral economics.

10 MR. CONRATH: No objection.

11 THE COURT: All right. The witness is deemed an
12 expert in the field of economics with those subspecialties in
13 particular.

14 MR. CHESLER: Thank you, Your Honor.

15 Q Professor, are you familiar in your professional life
16 with Professors Gilbert and Katz from the University of
17 California at Berkeley?

18 A Yes, I've known both of them for decades.

19 Q Do you have a professional opinion about each of their
20 qualifications as an economist?

21 A I do. They're both excellent scholars and I have a great
22 deal of respect for both of them and respect for both of their
23 opinions.

24 Q Now, have you been following the trial of this matter,
25 United States against American Express, over the past six or

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1 seven weeks?

2 A I have, yes.

3 Q Have you read portions of the record and reviewed at
4 least some of the documents that are in evidence?

5 A I have. Of course, there's been a lot of documents in
6 evidence and a lot of testimony. I can't say that I've read
7 all of it, certainly not all of it, I've read excerpts.

8 Q Included among the excerpts you've read have you read the
9 testimony of Professor Katz?

10 A Yes, I did read Professor Katz's testimony in its
11 entirety.

12 Q And have you read the testimony of Professor Gilbert?

13 A Yes, I have.

14 Q Have you prepared a set of demonstrative exhibits to aid
15 in your presentation of your testimony here today?

16 A Yes, I have.

17 MR. CHESLER: Your Honor, we've handed around a book
18 that has in it -- that should have in it Defendant's Exhibit
19 7828 for identification which consists of a pretty significant
20 number of demonstrative exhibits and for demonstrative
21 purposes we offer Defendant's Exhibit 7828.

22 MR. CONRATH: For demonstrative purposes, no
23 objection, Your Honor.

24 THE COURT: All right. Defendant's Exhibit 7828 is
25 received in evidence as a demonstrative exhibit.

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1 (Defendant's Exhibit 7828 so marked in evidence.)

2 Q Would you turn, Professor, to Slide 2 in the
3 demonstrative exhibit.

4 A Yes.

5 Q Do you have that.

6 And does this reflect the summary of your
7 conclusions in connection with the work you've done in this
8 case.

9 A Yes, it does.

10 Q All right. I'd like to turn to the first of the
11 categories or subjects covered or referred to on Slide 2
12 which is the Relevant Antitrust Market.

13 What is the basic process that economists follow
14 when defining a relevant product market for purposes of
15 antitrust analysis, Professor.

16 A Well, in an instance where one is beginning with an
17 allegation about the conduct of a particular firm, one starts
18 with the products of that firm and begins by defining the
19 product and then the next step is to look for substitutes for
20 that product, things that customers might use as alternatives
21 to that product.

22 Q Now, are you aware that, from your reading of portions of
23 the record, that Professor Katz suggested that it was not
24 necessary to determine a market definition or separately to
25 assess market power but instead he could look directly at the

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1 effects of the non-discrimination provisions here on
2 competition?

3 A I'm aware of that, yes.

4 Q Is that a subject on which you have an opinion or a view
5 in proceeding in that fashion?

6 A Yes, I do.

7 Q And what is your opinion about that?

8 A Well, I think that that's a fairly dangerous approach to
9 take in these kind of cases.

10 Q Why do you say that?

11 A Well, there are instances in which conduct can be subject
12 to very little interpretation, so that one can look at that
13 conduct and say this conduct both demonstrates the exercise of
14 market power and is anticompetitive. So, for example, if you
15 have a firm that's extremely dominant in a market, say a firm
16 with 80 percent of a market, and that firm is taking actions
17 that on their face consistently are excluding rivals from the
18 market, you can look at that and say, well, one definition of
19 market power is the ability to exclude rivals and that's being
20 demonstrated by this conduct, the conduct is also
21 anticompetitive and so one can proceed directly.

22 That should be contrasted with cases in which when
23 you look at the conduct, there are alternative interpretations
24 of the conduct. In those situations I think that it is very
25 important to look at market power because there is essentially

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1 universal agreement among economists that a company cannot act
2 anticompetitively without market power. So, if one has
3 competing explanations for the conduct as a sanity check, it
4 is important to look at market power and ask does this make
5 sense, it is another way of resolving which of two
6 interpretations of the conduct is the more likely one to be
7 true.

8 Now, if you look at the conduct and determine,
9 independent of thinking about market power, it does not
10 indicate anticompetitive -- it has no anticompetitive element,
11 then certainly there's no need to come back to the question of
12 market power but in the event that there are interpretations
13 that are surviving, one of which includes the possibility of
14 anticompetitive conduct, it is important to come back to
15 market power to distinguish between them.

16 Q And is analyzing substitution of products important for
17 the market power analysis?

18 A Yes, it's essential.

19 Q And is analyzing substitution important for an analysis
20 of competitive effects?

21 A Yes, it's essential for that as well, the allegations are
22 about the effect of conduct on substitution.

23 Q So, I'd like to start with what you said was the first
24 element or topic to cover in the process of defining a market
25 and I think you said it was the identification of the product

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1 or products, correct?

2 A Correct.

3 Q And have you identified what the product or products here
4 are that should be considered as relevant to the market
5 definition?

6 A Yes, I have.

7 Q And what is your conclusion with respect to that?

8 A Well, the products that are being offered by American
9 Express that are at issue here are transactions products,
10 they're products for bringing consumers and merchants together
11 and completing the transactions between them.

12 Q I'd like you to turn to the chart that is Number 4 in the
13 demonstratives.

14 By the way, did you review Professor Gilbert's
15 testimony that the product at issue in this case, the
16 transactions, resides in a two-sided market.

17 A I did, yes.

18 Q Do you have an opinion about that view of Professor
19 Gilbert's?

20 A Well, I think he's absolutely right and I don't think
21 that should be controversial, that is the right way to think
22 about this market.

23 Q Is there anything about the two-sidedness of this market
24 that you would add to the fact that it is two-sided?

25 A Yes, there are a couple of things that I think are

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1 important to keep in mind. The first is that it is a very
2 specific kind of two-sided market. This is an issue that
3 plays an important role in some of the analyses.

4 Think of it this way, when Amex is providing a
5 transaction service to a merchant, that is completing a
6 transaction for the merchant, it is providing it to the
7 consumer at the same time and when it provides it to the
8 consumer, it is providing it to the merchant at the same time.
9 Amex cannot provide a transaction service to the merchant and
10 not to the consumer or to the consumer and not to the
11 merchant. There is one service being provided here in order
12 to complete the transaction. That is different than many
13 other two-sided markets.

14 So, to take an example, think about newspapers which
15 I think is an example that's come up in this trial; so, with
16 newspapers, the two-sidedness involves readership on the one
17 hand and advertising on the other hand. Now, a newspaper
18 company can vary the number of advertisements in the newspaper
19 without changing the readership and it can change the
20 readership without changing the number of advertisements, the
21 two sides are not hard-wired together.

22 Here there is a single product, a single thing being
23 sold, it just happens that two parties are paying for it at
24 the same time. That's the first thing that I would add.

25 And then the second thing I would add is that it is

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1 very important to understand the nature of the transaction
2 services that Amex is offering. On the consumer side what
3 Amex is trying to do, and I think what it has historically
4 been successful at doing, is what it says on this slide,
5 creating valuable transaction experience for cardholders.
6 When shoppers go to stores, they value what they buy but they
7 also value the nature of their transaction experience, that's
8 why people shop at favorite stores, for example. The actual
9 transaction is part of that experience. Amex understands its
10 value to customers and tries to enhance it. That's my
11 understanding of their business model. And similarly, there
12 is value being generated on the merchant side by driving
13 business to the merchants.

14 Q Now, would you turn to the next slide, Slide 5.

15 Now, I take it you reviewed Professor Katz's
16 testimony that he defines a market that he called network
17 services to merchants, do you recall that.

18 A I do recall that, yes.

19 Q Would you explain what Slide 5 shows with respect to the
20 way in which Professor Katz defined the market here?

21 A Sure. Professor Katz is defining the market to be about
22 a product that is simply what he calls the network portion of
23 it. It's essentially the part of this process that pushes the
24 electrons to complete the transaction. In other words, the
25 markets that he defines are for products that do not include

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1 most of what's going on on the consumer side and do not
2 include most of what's going on on the producer side.

3 Q Is that the reason for the red X-s on Chart Number 5?

4 A It is.

5 Q Go ahead.

6 A So, those red X-s are simply showing what isn't in his
7 product definition and what I'm saying in this chart is that
8 that's a very peculiar way for him to proceed and one that I
9 just can't agree with, and the reason is that Dr. Katz and the
10 government have a specific theory about where market power
11 emerges from.

12 The question is, well, where does it emerge from.
13 Under their theory, it emerges from these consumer services,
14 it emerges from what Amex does to create what they call and
15 what Amex has also called insistence. So, that's all on the
16 consumer side.

17 Dr. Katz's market definition, when he starts with a
18 product, he defines the product in a way that excludes the
19 portion of Amex's activities that allegedly creates the market
20 power that the case is about and to me that makes no sense at
21 all.

22 Q So, let's turn to the second step of the framework that
23 you mentioned which is identifying I think you said users for
24 the product in question and the alternatives available to
25 them, is that right?

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1 A The product in question and the alternatives available to
2 the users, yes.

3 Q And have you conducted an analysis with respect to that
4 step?

5 A I have, yes.

6 Q Let's look at Slide Number 6 please. Do you have that in
7 front of you?

8 A I do.

9 Q Okay. Now, your first bullet on this slide which is
10 entitled Substitution Analysis says: Start with Amex,
11 spendcentric not lendcentric.

12 What does that mean?

13 A The "Start with Amex" simply means since this case is an
14 allegation about what Amex has done, we have to start with the
15 Amex products that are at issue. When I look at those
16 products, they are different from many other GPCC cards.
17 There are different business models about how to proceed
18 within this GPCC sector and some of those are what are called
19 lendcentric approaches, which I think the Court has heard
20 about. The Amex approach is a spendcentric approach.

21 The lendcentric approaches emphasize the importance
22 of revolving credit. That is not an essential feature, a main
23 feature of what Amex is doing. So, Amex's product is
24 differentiated at the start. So, we're starting with a
25 product that is not quite like some of these other products

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1 that have been discussed so far.

2 Q Did Professor Katz similarly start with Amex as the
3 starting point for his market definition effort?

4 A No. I was actually surprised to hear that in his
5 testimony. Dr. Katz testified that he began with GPCC by
6 assumption. Now, ultimately he and I don't disagree about
7 whether other GPCC cards should be in this market, we both
8 agree that they should, but this stopped him from thinking
9 about the nature of Amex's product in particular and its
10 substitutability with other products.

11 Q Now, is it possible, in your view, that American
12 Express's products and debit products are closer substitutes
13 for one another than, for example, Discover and debit are or
14 Visa and debit are?

15 A Yes, it is possible.

16 Q And why do you say that?

17 A Well, it relates back to this issue that I just discussed
18 about the central distinction between Amex's approach and the
19 approach of other GPCC companies, networks as being a
20 distinction between a lendcentric approach and a spendcentric
21 approach. In a lendcentric approach revolving credit is more
22 important, revolving credit is the primary distinction between
23 debit and these other products that we've been talking about.

24 In the Amex business model this revolving credit
25 does not play a significant role. It's much less important.

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1 Q Now, are you familiar in this context with something
2 called derived demand?

3 A Yes, I am.

4 Q What does that mean?

5 A Well, derived demand is a concept that economists often
6 talk about to express the idea that a company will have a
7 demand for something because the company's customers demand it
8 and in this context I think that the important point is that
9 merchants' demands for payment products is derived from
10 customers' demands for those payment products. The only
11 reason that a merchant wants to use a payment product is that
12 a customer wants to use the product.

13 Q And in fact, if you look at Slide 7, you're familiar with
14 the stipulation in this case between the parties on that
15 subject?

16 A Yes, I am.

17 Q Is that what's reflected on your Chart Number 7, the
18 parties have stipulated that merchants' demands for payment
19 card acceptance is derived from consumers' demands for payment
20 card usage?

21 A I'm sorry to interrupt. Yes, it is.

22 Q So, then let me ask if you would just look back for a
23 moment at Slide 6. We just talked about the third bullet.

24 The fourth bullet says: Analyze evidence on
25 reasonable interchangeability and consumer preferences.

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1 Explain to the Court what that involves doing.

2 A Sure. So, this step is the step where I ask is there
3 substitution between products. Substitution is fundamentally
4 determined by the interchangeability of those products in the
5 minds of consumers, whether a consumer looks at these products
6 and says, well, I can use one or I can use the other because
7 they serve essentially the same purposes and they're serving
8 them in similar ways.

9 So, a very standard way for economists to address
10 this idea of substitution is to look at evidence of
11 interchangeability.

12 Q And is that in fact, based upon your review of the record
13 here, what Professor Katz did in connection with his testimony
14 in the First Data case that he testified about here?

15 A Is that part of the record here or from the First Data
16 case?

17 Q He was asked about First Data here. Why don't you look
18 at Slide Number 8.

19 A Yes.

20 Q What is this?

21 A Right. This is -- well, I think what's on the bottom
22 there is the trial testimony in this case and what's up at the
23 top is Dr. Katz's testimony on his report, his expert report
24 in the First Data case.

25 (Continued on next page.)

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1 BY MR. CHESLER:

2 Q And is this at least a summary of the kind of
3 interchangeability analysis that you were talking about using
4 here?

5 A It is. I think that Dr. Katz is saying the same kind of
6 thing that I'm saying here, that one way to think about
7 substitution or a common way for economists to think about
8 substitution between products is to look at this evidence of
9 interchangeability --

10 Q Correct.

11 A -- and I think that's what he was doing, at least
12 according to this report in the first data case.

13 Q Now, in this case as opposed to the first data case, I
14 take it you saw that Professor Katz talked about employing
15 what he called the Hypothetical Monopolist or SSNIP test. Did
16 you see that in his testimony?

17 A Yes, and in his reports.

18 Q And did you employ a Hypothetical Monopolist Test here in
19 connection with your efforts to define a relevant market?

20 A No, I didn't.

21 Q Why not?

22 A Well, I didn't think in this case it would add much. I
23 think that in this case, the issues fundamentally come down to
24 qualitative evaluations of the evidence on interchangeability,
25 and in such instances, using a Hypothetical Monopolist Test is

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1 just not very informative. It doesn't add anything.

2 Hypothetical Monopolist Tests add something to the
3 discussion in a context where an economist can come up with
4 quantitative estimates of the -- what we call them is
5 elasticities, sensitivities that -- behavior to changes in
6 price and other things -- that would determine the effects of
7 the price increase that one hypothesizes within the context of
8 a Hypothetical Monopolist Test.

9 Quantitative estimates of those sensitivities are
10 not available in this case. I don't have them. Dr. Katz
11 doesn't have them. In addition, the Hypothetical Monopolist
12 Test in this case requires us to envision a world in which we
13 would have to do a lot of speculation.

14 So in particular, in this hypothetical world, Visa
15 and MasterCard would have to divest themselves of all of their
16 debit network capabilities, which would then be run by a
17 competitive industry aggressively trying to improve the
18 substitutability with credit and make incursions into that
19 market. I find it speculative to talk about these
20 possibilities. I don't think we have the data in quantitative
21 estimates that we need to do it.

22 Q So to be clear, is it your position that it's not
23 possible to conduct a SSNIP test without having quantitative
24 data relating to demand elasticities?

25 A No, it's not that it isn't possible. What I'm saying is,

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1 it doesn't add anything. It simply is another way of
2 expressing one's judgment about the qualitative evidence. The
3 judgment still fundamentally remains a judgment about the
4 qualitative evidence.

5 Q Now, have you on other occasions done a SSNIP test in the
6 presence of qualitative as opposed to the kind of quantitative
7 evidence you pointed out is lacking here?

8 A Yes. I've used the language of the SSNIP test in that
9 context.

10 Q Did you use the language of a SSNIP test, for example, in
11 connection with your work in the AMD against Intel litigation?

12 A I did, yes.

13 Q So, why was it that you felt it was appropriate to use
14 the language of the SSNIP test in that context, but you didn't
15 choose to do it here?

16 A So there are some cases in which the issue of
17 interchangeability is sufficiently clear that the language of
18 the SSNIP test is a way of re-expressing what is quite plain
19 from looking at the qualitative evidence.

20 So in particular, if you're in a situation where the
21 products are say, beer and prune juice, you know, you can look
22 at the qualitative evidence about the circumstances in which
23 people drink beer and what -- why they're drinking it and the
24 circumstances in which they drink prune juice and why they're
25 drinking it, and come to a conclusion from that as well as

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1 other qualitative evidence, that really, there is no
2 interchangeability between the two. And in that context, you
3 can then say, "Well, if I apply the SSNIP test here, I would
4 exclude prune juice from the market," which is something
5 that's worth saying because it's a recognized standard.

6 What I was saying in AMD and Intel, essentially, is
7 that this is a beer and prune juice case, based on the record
8 that I reviewed.

9 On the other hand when -- oh, I'm sorry, go ahead.

10 Q No, go ahead.

11 A When you're in the situation where there is evidence on
12 interchangeability, and it's plain that there is movement back
13 and forth, you can't say that's a beer and prune juice case
14 and you know the answer to a SSNIP test. You're in a
15 situation where it's say beer and wine, not beer and prune
16 juice, and now for the SSNIP test to add anything, you
17 actually have to have the quantitative estimates. So this
18 case is more similar to the latter instance, which is why I
19 say talking about the SSNIP test adds nothing to our
20 discussion of the qualitative evidence about
21 interchangeability.

22 Q What was it about the AMD Intel case that, in your view,
23 made the qualitative assessment so clear in terms of the lack
24 of substitutability?

25 A As I said, when I reviewed the evidence -- and it's hard

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1 for me to remember all the evidence at this time, many years
2 later -- but the conclusion that I reached was that, you know,
3 there just isn't any significant interchangeability.

4 For example, if you ask the question, embedded
5 chips, which are used in many applications, can those be used
6 for personal computers with adequate capabilities? The
7 answer is no, they can't. If you ask whether non -- what are
8 called, X86 chips can run software that companies have
9 invested in and basically locked themselves into by using
10 other kind of chips? The answer is no, they can't.

11 So in that context, I looked at that kind of
12 evidence and said, there's no interchangeability here that's
13 meaningful, maybe a little bit. There's none that's
14 meaningful, and thus, I reached the conclusion that those
15 things were not in the same market, and I put that in the
16 language of the SSNIP test.

17 Q Let me turn to your review of the evidence here. Based
18 on the analysis you did, substitutability, what did you
19 conclude about the relevant market in this case?

20 A My conclusion is that the relevant market includes at
21 least GPCC and debit.

22 Q And what do you mean by your use of the phrase "at
23 least"?

24 A So there are other payment products out there where there
25 are degrees of substitution -- and I think in some cases, I

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1 just don't have enough data to evaluate them -- but having
2 reached the conclusion that debit is in the market, I really
3 didn't need to do more work. Once debit is in the market,
4 it's plain that Amex could not plausibly have market power in
5 a market that's at least that broad.

6 Q We'll come back to that subject in more detail.

7 Are you aware that in the US v. Visa litigation, 12,
8 13 years ago, that the market that was then defined and
9 accepted by the court was limited to general purpose credit
10 and charge and not including debit?

11 A Yes, I'm aware of that.

12 Q And are you also aware that in the follow-on private
13 litigation several years later between American Express and
14 Visa and MasterCard, the same market definition was adopted?

15 A Yes, I'm aware of that, as well.

16 Q So why is it that you come to a different conclusion here
17 from the prior examinations of the industry in those two prior
18 litigations, and is there a chart in your prepared exhibits
19 that addresses this issue?

20 A Sure.

21 Q Why don't we look at slide number 9. Is this the chart
22 you just referred to?

23 A It is, yes.

24 Q All right. So you mentioned that nearly 15 years have
25 passed since one of those cases, seven years since the other.

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1 You say, "Since then," in the first bullet under that says,
2 "substantial growth in debit usage." Explain to the Court
3 what the significance of that particular entry is.

4 A Sure. The point here is that debit has been exploding.
5 Debit was not a particularly large fraction of payments back
6 at the time of U.S. v. Visa, particularly not backward looking
7 from that point in time, when you think about the 1990's.

8 Debit has exploded over the last 12 years, and it's
9 not simply that debit has grown, but there's very good
10 evidence that consumers' perceptions of debit have changed and
11 evolved, and the way they think about this is not the same as
12 the way they thought about these products back in 2000. This
13 is a dynamic evolving market and that's what I'm pointing to
14 in this first bullet point. Because of these changes, one has
15 to do a re-evaluation.

16 Q Now, to the extent that Professor Katz has suggested that
17 your position is that the growth that you're talking about by
18 itself establishes strong substitution between credit and
19 debit. Is that, in fact, your position?

20 A I want to be absolutely clear. I have never said that
21 and that is not my position and that is not what I'm claiming.
22 What I am claiming is that there has been a dramatic
23 development in this market that is hard to ignore and
24 shouldn't be ignored, and because of that dramatic
25 development, we have to go back and look at the evidence

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1 systematically. As we'll discuss, there is now a lot more
2 evidence to look at to evaluate whether debit should be in the
3 market or not. That's really my position.

4 Q Based upon your review of the record, what did Professor
5 Katz infer from the growth of debit?

6 A Dr. Katz made an inference that went something like this
7 in this testimony. He said that debit has been growing and
8 the use of checks has been shrinking and therefore, in his
9 opinion, debit has been substituting for checks.

10 Q Do you agree with that?

11 A No. I don't think that that's a scientific inference at
12 all. Checks -- it is entirely possible that the checks have
13 been declining over time for a variety of reasons just having
14 to do with the general change in technology. There's been
15 lots of movement from paper to electronics. That's part of
16 that.

17 So the patterns that Dr. Katz was pointing to are
18 entirely consistent with the idea that there has been a growth
19 in debit carving into the growth in GPCC. You just can't tell
20 the difference looking at that kind of data which of these
21 things were going on. You have to get into the micro-data.
22 You have to really dig into it. You can't just look at the
23 aggregate trends.

24 Q So with that background, let's look at slide 10, please?

25 A Yes.

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1 Q And what does slide 10 show? Explain to the Court what
2 this is about?

3 A Slide 10 is demonstrating -- and I think other
4 information along these lines has already been introduced --
5 but it's useful to just as a reminder go through this, that
6 there has been this very dramatic growth.

7 This slide is showing based on Nilson data, the
8 change in the use of credit and debit over time. And you can
9 see when you look back to the mid-1990s, debit is hardly
10 noticeable at all. It starts climbing towards the end of the
11 1990s, but looking back from 2000, still it hasn't had much of
12 a track record. It hasn't been around for very long.

13 Now, the growth of debit exploded after that. Back
14 in the 1990s debit was a tiny fraction of credit. Now,
15 they're almost equal. So this is an illustration of just how
16 dramatic this transition has been. People have gotten
17 accustomed to using debit.

18 Q Now, is it possible that this growth is the result of
19 some consumers just using debit a lot more than they used to
20 as opposed to many more people using debit?

21 A Well, the evidence doesn't support that hypothesis. The
22 evidence indicates that debit has been -- its use has been
23 expanding through the population.

24 Q Would you look at the next slide, number 11, please?

25 A Yes.

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1 Q What does this show?

2 A This is showing the fraction of households that use debit
3 cards and tracking how that's changed over time. So you can
4 see back in 1995, only 17.6 percent of the population even had
5 debit cards. 2001, the time of U.S. v. Visa, not looking
6 backwards, but looking at the point in time it was still less
7 than half, and you can see that by 2010, it's climbed to
8 nearly 80 percent of the population. And if you did some
9 adjustment for the volume of spending by these customers, I
10 think that that would be even more skewed because customers
11 who spend a lot tend to have debit cards.

12 Q Now, is this growth that we're looking at here confined
13 to particular industry segments?

14 A Not really. From what I've been able to determine,
15 there's been rapid growth in virtually all industry segments
16 where these kinds of plastic products are used.

17 Q Let's look at the next slide, number 12. What does slide
18 12 show?

19 MR. CHESLER: And your Honor, there are data on here
20 that are confidential, so I'm going to ask if we could just
21 not display this. These are data that are sought to be
22 protected by third parties.

23 THE COURT: Very well. You can go ahead now.

24 MR. CHESLER: Thank you, Your Honor.

25 THE COURT: Can I just ask a question on the last

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1 slide, number 11, where it says that, "The fraction of
2 households that used debit cards," debit cards serve different
3 functions. One is for purchases, another when a bank issues
4 debit cards, which also served as ATM cards. Does this slide
5 say that 78.4 percent of the households use these cards for
6 purchases or that they were issued and have in their wallets
7 these cards?

8 THE WITNESS: Yes. That's a useful clarification.
9 These data only say that they have the cards and that they
10 have used them. It doesn't say what they've used them for.

11 THE COURT: Okay.

12 THE WITNESS: We are going to look at other data
13 that will address the important question of what they have
14 been using them for.

15 THE COURT: All right. Thank you.

16 THE WITNESS: Sure.

17 BY MR. CHESLER:

18 Q I think we're now on slide number 12. And Professor, I
19 don't want you to mention the names or the numbers, that is
20 the names of the merchants or the particular numbers
21 associated with each merchant, and with that caveat, can you
22 describe for the record what slide 12 is intended to depict?

23 A Surely. These are data that were obtained from Visa
24 through discovery. And what they are showing is the breakdown
25 of purchase volume on Visa products as between debit and

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1 credit products at various merchants, five merchants. And
2 they're showing it at two points in time. One is second
3 quarter of 2008, and the other is a period of time between the
4 end of 2010 and the first half of 2011. The white bar is the
5 earlier period. The green bar is for the later. Each bar is
6 showing the fraction of spending -- Visa spending that is
7 debit spending, and what you can't take from this --

8 THE WITNESS: And I know, Your Honor, I can't say
9 the numbers out loud.

10 A But what we can take from this is that at these
11 merchants -- I suppose I should comment on the merchants.
12 Notice that the merchants come from a variety of different
13 industries. We've got gasoline. We've got home improvements.
14 We've got clothing. We've got department stores.

15 Okay. So what you notice is that the level of usage
16 at all of these stores is quite high, which I think addresses
17 your previous question, at least as to these merchants, and
18 the other thing that you can see is that even over this
19 relatively short period of time, a little over two years,
20 there was quite dramatic growth in the use of debit. So this
21 reflects that debit is used not just more in total, but is
22 being used more and more at individual merchants.

23 Q Now, what is the metric here? Is this dollars spent? Is
24 it number of transactions? What is the metric that's being
25 reflected in this chart?

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1 A This is purchase volume, so this is percentage of
2 purchase volume.

3 Q So percentage of dollars spent on Visa that were spent on
4 debit in those two periods of time for those five merchants?

5 A That's correct.

6 Q Now, would you look at the next slide, please, 13?

7 MR. CHESLER: Your Honor, this is another one with
8 confidential third-party data.

9 BY MR. CHESLER:

10 Q And again, don't mention the names of the merchants or
11 the numbers. What does this slide depict, sir?

12 A This is the same kind of data for MasterCard rather than
13 for Visa. In each one of these cases, I believe that what
14 we're showing are the five largest merchants for each one of
15 them. So the five largest merchants are not quite the same.
16 Four of them are the same on each slide. One of them is
17 different. But that's why there are these merchants. And now
18 another difference here with MasterCard is that you'll notice
19 that the time frame that's being spanned here is longer.

20 So the white bars are for 2006 and the green bars
21 are for the period of time spanning mid-2011 to beginning of
22 2012. So it's a longer period of time. It's more like five,
23 five-and-a-half years. And that's why you see so much --
24 well, that's why you see -- one of the reasons why you see it
25 starting at a lower level, but it's also a reason why you see

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1 so much more growth. Over a longer period of time, the
2 explosion of the use of debit at these merchants is more
3 evident.

4 THE COURT: Is there any reason then to explain why
5 with regard to MasterCard the percentage are substantially
6 lower than with respect to Visa?

7 THE WITNESS: I think that that may have been a
8 reflection of business strategies and the degree of
9 aggressiveness with which they pursued the debit market and
10 the timing in which they did that.

11 BY MR. CHESLER:

12 Q Now, I'd like you to look at slide 14, please. Still on
13 the subject.

14 MR. CHESLER: This also has confidential
15 information, Your Honor, of third parties.

16 THE COURT: Very well.

17 BY MR. CHESLER:

18 Q Staying on the subject of this growth of debit usage over
19 time, without naming names or numbers, what does this slide
20 depict?

21 A Well, this slide is just showing data from a collection
22 of merchants who have testified at trial, and the data come in
23 somewhat different forms and say somewhat different things,
24 but each one of these gives some idea for that merchant of the
25 importance of debit as a share of something, either as a share

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1 of GPCC plus debit, or as a share on the final case as a
2 fraction of total sales. In a couple of cases, it's just PIN
3 debit rather than total debit, because that's the nature of
4 the data that they supplied at trial. But the message that
5 comes from this is that in all of these cases, this is quite a
6 significant number.

7 MR. CONRATH: Your Honor, I note that the citation
8 on this document --

9 THE COURT: I know.

10 MR. CONRATH: -- documents and testimony is
11 extremely vague.

12 THE COURT: Well, that's why we have
13 cross-examination.

14 MR. CONRATH: All right. Well --

15 THE COURT: Well, and the documents show what the
16 documents show, and I'm sure there will be plenty of
17 opportunity in the submissions after trial to scope it out --

18 MR. CONRATH: All right. Thank you.

19 THE COURT: -- on both sides.

20 MR. CHESLER: Thank you.

21 BY MR. CHESLER:

22 Q Just one other point about this chart. For two of the
23 merchants, it indicates that these are PIN debit shares of
24 general purpose credit and charge plus debit, is that right?

25 A That's correct.

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1 Q Did you have a view as to whether the percentages for all
2 of debit were it not just restricted to PIN debit would be
3 higher or lower than the numbers that are depicted on those
4 two lines?

5 A Well, it would certainly be higher because this is only
6 showing part of debit. Signature debit is quite important at
7 a lot of merchants. Its importance relative to PIN debit
8 varies, so I can't say how much higher they would be, but they
9 would certainly be significantly higher.

10 Q Now, did you also examine data relating to the use of
11 debit at travel and entertainment merchants, in particular?

12 A Yes, I did.

13 Q Let's look at slide 15. Again, because of
14 confidentiality concerns, please don't name the names of the
15 merchants or the particular percentages. What does slide 15
16 depict?

17 A Slide 15 is showing the same kind of data, and this is
18 going back to Visa. So it's the same kind of data from Visa,
19 again, for the time period that we discussed before, 2008
20 through the 2010, '11 period. And it's showing the fraction
21 of Visa spending that was debit at a collection of T&E
22 merchants. We have some airlines here -- I can't name them --
23 a rental car company, and some hotels and so forth.

24 So these are T&E places, and you can see again
25 significant use of -- not simply significant use of debit, but

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1 also significant growth in the use of debit over a relatively
2 short period of time.

3 Q And what significance do you attribute to the fact that
4 there is this significant level -- there is significant
5 growth, albeit as a general matter, the numbers or somewhat
6 lower level than some of the numbers we saw on the prior
7 charts?

8 A Sure. Well, I think the growth reflects the reality that
9 consumers are increasingly regarding these as interchangeable
10 products, that there is convergence in terms of how consumers
11 are using payment methods.

12 Q Now, if you -- the data that we're looking at here on
13 chart 15, these are percentages of Visa spend, is that right?

14 A That's correct.

15 Q If you were looking at debit as a percentage of total
16 spend on plastic, would the numbers be lower?

17 A Yes, it would be. One of the -- I believe one of the
18 airlines that was shown on that slide, there's testimony where
19 they said that the share of debit overall would be a lower
20 number that I don't think I can say, but still quite a
21 substantial fraction.

22 Q Now, you also -- if we go back to -- if we look at slide
23 16. We don't have to go back. I guess we have got it right
24 here. After highlighting substantial growth in debit usage,
25 you have a bullet that says, "Academic literature on consumer

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1 payment preferences and usage," is something else that has
2 come about in the period of time since the earlier
3 Visa-related litigations, is that right?

4 A That's correct. There has been literature that's been
5 emerging, mostly 2008 and after, this is -- these are issues
6 that economists had not studied in scholarly articles prior to
7 that. But with the availability of new data, it's attracted
8 attention.

9 Q And what is the general import of the literature that
10 you're referring to in this bullet?

11 A Well, it is examining parts of the literature. Some of
12 the papers in the literature examine substitutability between
13 debit and credit. They don't specifically address the
14 question of definition of antitrust markets because that's
15 more of a long economics question, but they do address the
16 underlying fundamental issue of substitutability.

17 Q And what's the general view that's expressed in those
18 pieces of literature?

19 A Generally, what's found is that there is significant
20 substitutability between the use of these two types of payment
21 methods.

22 Q Let me ask you about one of those. It's an article
23 that's been referred to earlier in the testimony. Are you
24 familiar with a publication by a Professor Zinman of
25 Dartmouth?

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1 A Yes, I am.

2 Q And if you look at slide 17, is this referring to that
3 publication by Professor Zinman from the *Journal of Banking*
4 *and Finance*?

5 A It is, and these are some excerpts from that publication.

6 Q Without reading them into the record, what is the bottom
7 line of what Professor Zinman found?

8 A Well, he's saying three things. One is that he's finding
9 that debit card use responds strongly to the price of making
10 payments with credit cards, which he is calling a close
11 substitute based on his analysis.

12 The second thing that he's pointing out, which is
13 very important, is that this pattern, this substitutability,
14 appears to have been increasing over time as customers find it
15 easier and easier to switch between different kinds of payment
16 methods, and the last thing that he says -- which I think is
17 notable -- that he expresses the opinion here that this is
18 relevant for antitrust considerations, that antitrust
19 regulators should take the nature and degree of that
20 substitutability into account.

21 Q Now, back -- I guess let's look at 18. We don't need to
22 go back. We have put copies in. Moving through the bullets
23 on what's changed since the earlier Visa litigations, you have
24 the next entry that says, "Newly available empirical data"?

25 A Yes.

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1 Q And are there, in fact, newly available empirical data
2 that you have examined in connection with your work here?

3 A There are. There are a couple of new data sources that
4 have become available.

5 Q And is one of those survey data that is compiled by the
6 Boston Fed?

7 A Yes, the Survey of Consumer Payment Choices.

8 Q Let's look at Exhibit 19, please.

9 MR. CHESLER: Your Honor, the next several slides
10 about this particular exhibit can be publically displayed.

11 THE COURT: Very well.

12 BY MR. CHESLER:

13 Q Do you have 19, sir?

14 A Yes, I do.

15 Q So what is slide 19?

16 A Slide 19 is essentially showing what the survey is asking
17 its respondents, and it asks about number of aspects of
18 different payment methods. One of the things that it asks
19 about is convenience. So this is showing the question about
20 convenience and it's asking consumers, respondents to rate the
21 convenience of each one of these payment methods, and you can
22 see that the payment methods are lined up against each other,
23 cash, check, debit, credit and so forth, which is causing
24 consumers, respondents when they answer this survey to
25 essentially use this scale to make comparisons between these

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1 products.

2 The scale here is a scale that goes from one, which
3 is very hard to use to five, which is very easy to use. This
4 is called the Likert scale. Likert scales are widely used in
5 psychology and in subfields of economics, and it's useful for
6 making these kinds of comparisons.

7 Q And did the Boston Fed survey look at features other than
8 convenience in this context?

9 A They did. They looked at several others.

10 Q Including security?

11 A Yes.

12 Q Including acceptance?

13 A Yes.

14 Q Now, I'd like you to look at slide 20. Are those
15 metrics -- convenience, security, acceptance -- are those
16 among the metrics that the government and Professor Katz have
17 pointed to here in the context of the definition of market
18 exercise?

19 A Yes. When they have discussed the issue of
20 interchangeability, they pointed to four characteristics. The
21 three that you -- the three that you just mentioned. I'm just
22 looking at the complaint, the DOJ complaint, which says,
23 "Convenience, widespread acceptance, security and deferred
24 payment options," and the survey that I just discussed
25 addresses the first three of those.

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1 Q Okay. Let's talk about those for a bit.

2 Would you look at slide 21, please? What does slide
3 21 show?

4 A Slide 21 is showing how consumers rate the debit cards
5 versus GPCC cards along each one of these three dimensions.
6 So the first pie cart is for security, the second for
7 acceptance, the third for convenience.

8 Those pie charts are divided into three pieces. One
9 piece is the yellow piece, represents the people who saw no
10 difference between the two when they rated the products. The
11 second, the orange piece, are the ones who said that the GPCC
12 rated more highly. And the third, the red piece are the ones
13 that say that debit rated more highly. And the thing that's
14 striking as you look across this is that all of these cases,
15 somewhere between two-thirds and three-quarters of the
16 respondents rated the two products as identical on these
17 dimensions.

18 Now, I should also add that among the others who did
19 not rate them as identical, if you look at the other two
20 slices, in the vast majority of cases, the ratings differed by
21 the smallest possible increment. So this data is showing
22 perceptions of consumers that say that they view these
23 products very similar, very similarly in these two dimensions.

24 Q Now, the fact that in each of these -- for each of these
25 considerations, security, acceptance and convenience, there is

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1 a percentage of the users who view GPCC as either more secure
2 or more accepted or more convenient. Does that indicate lack
3 of interchangeability for purposes of your determination in
4 market definition?

5 A No, in any market with some degree of product
6 differentiation, there are going to be people who say that the
7 two products aren't identical. There are going to be people
8 who recognize that. That's a reflection of differentiation.
9 I've used these kinds of data in my own research and other
10 context, much different context.

11 So one example that I gave in one of my reports was
12 that I gathered data using Likert scales like this on snack
13 foods. So I have data on, for example, Three Musketeers bars
14 and Milky Way bars, which most people would say are very
15 highly substitutable and in the same market.

16 If you look at the ratings of those items along the
17 dimensions that -- that we ask people about, you get kind of
18 similar pictures, that a very large fraction of people say
19 that they are the same and then some people say, yeah, they're
20 not quite the same formula. So these are the kinds of
21 distributions that you tend to get for things that are fairly
22 similar.

23 THE COURT: Did you really do a study on Milky Ways
24 and Three Musketeers? Why would anyone do this stuff? You
25 know --

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1 THE WITNESS: That's -- my graduate students have
2 been asking me the same question.

3 THE COURT: It's a good question.

4 THE WITNESS: In fairness, there were about a 180
5 other products. I just pulled out --

6 THE COURT: You just picked those two?

7 THE WITNESS: Yes. Right.

8 THE COURT: We're going to do our own study on it
9 when we're finished with all the testimony.

10 MR. CHESLER: I was going to ask if there's a study
11 of mixing Milky Way and prune juice, but I'm not going to go
12 into it.

13 THE COURT: We won't go there.

14 BY MR. CHESLER:

15 Q Are you also able to use the Boston Fed survey data to
16 compare perceptions of credit and debit with other forms of
17 payment such as cash and checks?

18 A Yes. And I think that this is telling.

19 Q Well, let's look at the slide. I think -- yes, it's 22.
20 What does slide 22 depict, sir?

21 A So now we're looking at one of the three dimensions.
22 We're just focused on security. And the first pie chart over
23 on the left-hand side is the same pie chart that we already
24 looked at, it's the comparison between debit and credit. And
25 it's showing what we said before, that for security, about

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1 two-thirds of the people say that debit and credit were the
2 same on this dimension.

3 Now, to gauge whether that's a lot or a little, what
4 I'm doing here is making comparisons with a similar
5 calculation for other means of payment, in particular for
6 check and cash. And in each one of those cases, the question
7 that I'm asking is, how many people saw check and GPCC as
8 identical? How many people saw cash and GPCC as identical?
9 And you can see that while an awful lot of people think of
10 debit and GPCC as essentially identical in this dimension,
11 they do not answer the same way for check and they do not
12 answer the same way for cash. There is a significant
13 difference.

14 Q Did you look at the other variables in this context as
15 well, namely, acceptance and convenience?

16 A I did.

17 Q Let's look at slide 23. Does this focus on acceptance,
18 again, looking at comparisons to debit, check and cash?

19 A Correct. So this is acceptance, making the same
20 comparisons. You can see that nearly three-quarters of the
21 people who responded said that debit and GPCC were essentially
22 identical in this dimension. For check, it's only 32 percent.
23 For cash, it's 56 percent.

24 Q Let's look at the next chart, 24, with respect to
25 convenience. What do those data show?

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1 A Well, again, we find essentially the same pattern for
2 convenience. Nearly three-quarters saying that debit and GPCC
3 are identical on this dimension, far smaller proportions for
4 check and cash versus GPCC.

5 Q And I think you mentioned earlier that Professor Katz
6 and/or the government had identified a fourth characteristic
7 of payment methods, deferred payment, correct?

8 A Yes, correct.

9 Q Did you also look at that dimension when making your
10 assessment about market definition?

11 A I did, yes.

12 Q Do you agree with Professor Katz that deferred payment on
13 credit and charge cards is a basis on which to distinguish
14 them from debit for purposes of defining a relevant market?

15 A Well, I agree that it's a characteristic that some
16 consumers care about in some contexts, but I do not think that
17 it's something that sufficiently differentiates this product
18 to justify putting them in different markets.

19 Q Why not?

20 A Well, there are number of reasons. And I think there's a
21 slide that summarizes them.

22 Q Yes, there is. Let's look at number 25, please. So this
23 is entitled "Deferred payment not a significant differentiator
24 here." The first bullet says, "Float is small and an element
25 of consumer cost." Explain to the Court, if you will, what

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1 that entry is intended to refer to.

2 A Yes. Float is simply a reference to the fact that with a
3 GPCC card, there is a delay between the purchase event and the
4 transfer of the money, even if the individual is not using the
5 revolving feature.

6 And there has been some academic study. This is
7 something that the government pointed to. It is a small
8 number. This is not a very big number, and what I'm pointing
9 out here is that the right way to think about float is that
10 it's just another aspect of cost to consumer. It's like a
11 reward in some sense. It's a very small reward. It's saying
12 you'll get the benefit of this, of zero interest for a short
13 period of time.

14 Q What about the next entry? "Credit is separable from
15 payments. Consumers can and do obtain it in other ways."

16 A Sure. So this is just the observation that increasingly,
17 we have the option to mix and match on our own. We have
18 access to credit lines in a variety of ways. And we can use
19 our debit cards to spend money that we've accessed through
20 those credit lines. I mean, literally with my thumb, I can if
21 I want, transfer money from a credit card credit line to my
22 checking account, and then use my debit card. So essentially,
23 that means that what I've done is use that credit facility to
24 supplement my debit card. That's not a very hard thing to do.

25 Q Next bullet says "SCPC." That's the Fed survey?

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1 A Yes, that's correct.

2 Q It finds that only 40 percent of consumers revolve in the
3 course of a year. What is the significance of that in the
4 context of this deferred payment issue?

5 A Right. So it's pointing out that there is some variety
6 of cross-consumers, but the majority of consumers in any given
7 year are not actually not even using the revolving feature.
8 And of course for Amex card members, it's much smaller, given
9 the spendcentric nature of the Amex business model.

10 Q The next entry says, "U.S. v. Visa found that Amex was in
11 the market, despite the fact that a large part of Amex's
12 business is based on charge cards without a credit facility,"
13 What's the significance of that?

14 A Right. That is just pointing back to the U.S. v. Visa
15 decision, and the bullet point here basically states it. If
16 the credit facility issue was a significant definitive issue,
17 then the court in U.S. v. Visa should not have reached the
18 view that Amex was in the same market as other GPCC cards,
19 given that the Amex cards were at that time, classic charge
20 cards, as opposed to having the same revolving features.

21 Q And then lastly, "Even if credit facility is significant
22 to some consumers, most Amex cards are charge, not credit.
23 Possibility Amex is closer substitute for debit than are other
24 GPCC networks." The same point you were just making, sir?

25 A Yes. That's correct. That's the point I was just

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1 making.

2 Q Okay. Now, does the Boston Fed survey provide data on
3 consumers' views relating to sort of direct data about the
4 deferred payment element?

5 A No, it doesn't.

6 Q Does it have any data from which you can draw any
7 conclusion that is indirect evidence?

8 A Yes, it does.

9 Q Let's look at slide 26, please. This is entitled, "Debit
10 use affected by perceived cost of GPCC." Would you take a
11 moment and -- maybe a few moments and describe what this
12 shows?

13 A Sure. Well, let me first describe what I'm trying to do
14 with this figure. And related to what you just asked about
15 the four concerning revolving credit. If revolving credit is
16 a factor that stops substitution between debit and credit,
17 then we shouldn't see much substitution when the perceived
18 costs of GPCC change. On the other hand, if people are
19 substituting from one to the other, that means that that is
20 not a factor that is stopping interchangeability.

21 So what the survey collects is data on the number of
22 transactions using different means of payments by each of the
23 respondents during a given month. And they also, as we saw
24 before, collect this information on how they rate different
25 payment methods according to different dimensions. One of the

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1 dimensions that they asked about was cost, how costly is to it
2 use this method to you.

3 So what I'm doing here is relating the use of GPCC
4 and debit from this survey to the perceived cost of debit. So
5 on the horizontal axis here, we have the expense of debit --
6 pardon me, of GPCC.

7 Q Let's stop there. You said the perceived cost of debit?
8 Did you mean to say that?

9 A I apologize. I misspoke. The perceived cost of GPCC.
10 Separately, we have the perceived cost of debit and I take
11 that into account when I do this analysis. But I'm focused
12 here on the perceived cost of GPCC, and on this horizontal
13 axis here that goes from one to five on the left-hand side, we
14 have GPCC being perceived as expensive, on the right-hand
15 side, we have it being perceived as inexpensive.

16 Q Let me just stop you for a moment. The numbers one, two,
17 three, four, five, are those the numbers that were used in the
18 survey for the respondents to rate their perception of
19 expense?

20 A Correct. That's that Likert scale that I referred to
21 earlier.

22 Q Why don't you proceed with your description of the slide.

23 A So what this slide is doing is illustrating the
24 relationship between transactions involving debit and
25 transactions involving GPCC. How that varies as we look

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1 across people who think of GPCC as very cheap or as very
2 expensive. And I should mention that this diagram is actually
3 based on a statistical analysis that also controls for the
4 perceived costs of debit.

5 What this is showing, you look at this green line,
6 the green line is showing GPCC transactions and you can see
7 that as you move from left to right, the GPCC is getting less
8 expensive, there is a very large increase in GPCC
9 transactions. It essentially doubles from 15 to 30 per month.
10 And now the yellow line is showing what happens to debit
11 transactions and you didn't see that that is decreasing as you
12 move from left to right. As GPCC is becoming less expensive,
13 looking across people, we're seeing less use of debit.

14 So more use of GPCC, less use of debit, that is what
15 substitution is all about. And of course as you go to left
16 side, GPCC becoming more expensive, we see decrease in GPCC
17 transactions, very large increase in debit transactions.

18 Q Now, did you also look in the survey data to examine the
19 relationship between credit on the one hand and cash and
20 checks on the other hand?

21 A Yes, I did. And that's a good check on this analysis to
22 see whether we really found something. I think we have a
23 slide that shows that.

24 Q Let's look at slide 27. So, explain what slide 27 shows.

25 A Slide 27 is shown at the same way and it's set up the

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1 same way and it's showing the same kind of results. I
2 replicated here, again, the horizontal axis we're varying the
3 costs of GPCC. The yellow line, once again, is showing the
4 number of debit transactions per month. And you can see, it
5 is declining. It's the same line as before. As GPCC gets
6 cheaper, it declines. But I've add two more lines, one for
7 cash transactions and one for check transactions. And you can
8 see that both of those lines are essentially flat.

9 So what this is showing you is that people are
10 substituting between GPCC and debit, not necessarily between
11 GPCC and these other means of payments -- and triangulating
12 from multiple data sources, combining this with what we saw
13 from the survey of consumer payment choice, this makes sense
14 because that survey was showing you that people regard GPCC
15 and debit as largely interchangeable. It didn't tell you
16 about the revolving facility.

17 But here, this substitution between debit and GPCC
18 would not be observed unless that was not so large as to
19 prevent people from being willing to substitute between the
20 two.

21 Q Now, on this last issue that we're looking at here from
22 slide 27, do you and Dr. Katz agree about the interpretation
23 of these data?

24 A No, we don't.

25 Q What's the -- in simple terms -- what's the nature of

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1 your disagreement here?

2 A So what Dr. Katz speculated that there might be a
3 statistical problem with the statistical analysis, the
4 regressions that underlie these figures and he suggested a
5 different approach.

6 The approach that he suggested works like this.
7 These data actually followed people in two consecutive years.
8 And he said what we should be doing is taking the people who
9 rated GPCC as say a three one year and then rated it as a four
10 next year, and ask whether there was a shift in their use of
11 payment methods. So that's the nature of the statistical
12 analysis that he did.

13 Q And --

14 THE COURT: Can I just ask how you measure the
15 relative cost of GPCC for the purpose of this study? How do
16 you determine whether GPCC is more expensive or less
17 expensive? Are you going there? Well, let's go there.

18 MR. CHESLER: Let's back go back to it.

19 THE COURT: Sure.

20 MR. CHESLER: I think Professor Bernheim alluded to
21 it when I asked him what the one, two, three, four, five on
22 the bottom were.

23 THE COURT: In terms of the respondents, how do
24 they -- what's the protocol or the means by which they're
25 directed to make their ratings?

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1 THE WITNESS: So they are directed -- well, they are
2 free to use the ratings however they think is appropriate.
3 And the idea of asking a broad question is to not confine the
4 respondents to thinking about a particular aspect of cost. So
5 the object is to get them to think about the broad -- broadly
6 about the things that they consider to be relevant to the cost
7 of using a card.

8 So, you know, it might be things related to
9 convenience or it might be actual fees. It might be a range
10 of things. But it's that collection of things that are going
11 to determine their behaviors. The object is to ask them a
12 broad question.

13 A shortcoming of the study is that it doesn't ask
14 them to attach a dollar value that to that. We don't have
15 that. Instead, we use the Likert scales which have proven
16 useful in a wide variety of research context. So these are
17 perceived relative levels of cost that we're using.

18 THE COURT: So there's no -- it's not a formula that
19 the -- that the respondent would be using. It's how they
20 perceive it, feel about it, how it sort of, how they deal with
21 it?

22 THE WITNESS: Yes. And that's exactly it, which is
23 the important thing because ultimately, we're interested in
24 their behavior, and their behavior is determined by their
25 perceptions as opposed to calculations. How do they feel

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1 about this along these dimensions? That's an indication of
2 what drives their choices.

3 THE COURT: All right. If they had more information
4 about the actual costs of these different methods of payment,
5 would there be an opportunity to get a more specific response
6 to those kinds of questions so they would, even if they felt a
7 certain way, if they knew that the cost of this card or the
8 cost of that card are different, the cost of a debit card is
9 lower than the cost of a GPCC card?

10 THE WITNESS: So --

11 THE COURT: What I'm saying to you is, well, what we
12 have learned here, if we learned nothing else is, that there
13 is -- there is not widespread understanding of the cost to the
14 merchant of these different forms of payment --

15 THE WITNESS: Yes.

16 THE COURT: -- of plastic, titanium, if you will.
17 All right? So -- and so I'm trying to get a sense of whether
18 this kind of a study is helpful in the context of what we're
19 trying to ascertain here about the availability of information
20 on the relative cost of forms of payment.

21 THE WITNESS: So -- and this is a useful
22 clarification. What this study is getting at is a sensitivity
23 of consumers to the aspects of cost that they face, not the
24 aspects of cost that someone else is absorbing, which is what
25 we as economists usually do.

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1 So for example, if you are buying, you know, Crest
2 or Colgate toothpaste at the store, I suppose we could ask,
3 are you sensitive to the wholesale price of Crest or Colgate
4 toothpaste, because of course that affects the merchant's
5 margin. Do you know the wholesale price of Crest or Colgate?
6 Probably not, because the merchant isn't telling you that.

7 What you're responding to is the consumer price.
8 That's what you really care about, unless the merchant is
9 telling you that they want you to do something else for their
10 good as opposed to your good.

11 So the way I'm approaching this is that I'm looking
12 at the consumer side and cost that the consumers bear, and
13 seeing how responsive they are to those. With the -- for
14 Visa, that doesn't include variation of the merchant costs and
15 then later on I think we'll get back to that issue and ask the
16 question if the consumers are only responding to the costs
17 that they face, does that create sufficient competition in the
18 market. My conclusion is going to be yes, it does. So that's
19 why I'm focusing on these responses.

20 THE COURT: And one other aspect of this is that
21 consumers actually do care about wholesale costs for big
22 ticket items. So when you're buying a new car, you know,
23 consumers tend to -- many consumers tend to go into great
24 detail, do a great deal of research about wholesale cost and
25 dealer cost and markups and so forth as opposed to when

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1 they're buying Crest toothpaste at Rite Aid or CVS or
2 Walgreen's.

3 THE WITNESS: Your Honor, you're absolutely right.
4 And so --

5 THE COURT: Isn't that another meaningful
6 distinction that may not be addressed in this kind of a
7 survey?

8 THE WITNESS: So I think that what you're pointing
9 to is that we care about the wholesale price in some context
10 because we think that knowledge of the wholesale price will
11 help us negotiate a different retail price. Ultimately, what
12 we care about is the retail price. You're buying a car.
13 You're buying a Toyota. You want to know what the wholesale
14 price is, but not because you care about the wholesale price
15 directly. You think that by knowing that, you can get
16 yourself a better retail price. You ultimately care about the
17 better retail price.

18 I do not think we have a counterpart of that in this
19 case, because when you're going through the checkout line in a
20 store, you're not going to say, I know you have a different
21 margin here and so my knowledge of that margin is going to
22 cause me to negotiate with you. So that's the distinction.

23 THE COURT: Okay. Thank you.

24 BY MR. CHESLER:

25 Q I want to come back for a moment, Professor, to the

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1 disagreement over the data we happen to be looking at the
2 moment between you and Professor Katz. You started to say
3 that he believed the way to go about this is to look at how
4 consumers perceived the cost of GPCC in consecutive years,
5 correct?

6 A Correct.

7 Q And what is your disagreement with approaching the data
8 in that way, to attack essentially the conclusion that you
9 reach as reflected on slide 27?

10 A Well, I think it reflects a misunderstanding of how
11 consumers tend to -- respondents tend to use these Likert
12 scales. They are not exact. If you ask somebody the same
13 question twice at two different periods of time, they may give
14 slightly different answers, not because the underlying reality
15 has changed, but simply because their reporting is changing.

16 So in particular, when you look between two years,
17 these two waves of the survey, it's very unlikely that the
18 consumers' underlying conditions have really changed. Given
19 the nature of the Likert scales, you're mostly measuring noise
20 when you look at that differences, and so consequently, when
21 you see that there is not a great response to the changes,
22 that's indicating that the noise is not related to the
23 behavior. That's just a matter of what people report as
24 opposed to the underlying reality.

25 Q Is there a term that relates to that, the noisy variable?

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1 A Well, there's -- in statistics, it's called the errors in
2 variables problem and there is a literature that addresses
3 exactly this issue, that when you have what's called a noisy
4 variable and you look at that change in that noisy variable,
5 that that creates very strong what's called attenuation bias
6 and makes it very hard to detect any effect, and I think that
7 that's essentially what's going on with Dr. Katz's analyses of
8 these data.

9 Q I see. Move to a related topic, are you familiar with
10 the argument Professor Katz makes in the context here of debit
11 usage relating something called tailoring or
12 compartmentalization?

13 A Yes, I am.

14 Q What is your understanding of what that term means in
15 this context, "tailoring"?

16 A Tailoring is a theory that Dr. Katz articulated back in
17 U.S. versus Visa and the idea is that people use different
18 payment methods for different things. They may be using
19 multiple payment methods, but they use them for different
20 purposes and consequently there isn't switching or mixing
21 between them.

22 Q Let me ask you to go to slide 29, please.

23 MR. CHESLER: And this, Your Honor, has
24 confidential.

25 THE COURT: Yes, I'll change the monitor.

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1 MR. CHESLER: Thank you, Your Honor.

2 THE COURT: Go ahead.

3 BY MR. CHESLER:

4 Q What does slide 29 depict, without stating the particular
5 numbers?

6 A So slide 29 is actually from Dr. Katz, and it's showing
7 the share of different -- out of total payments, the share for
8 different payment methods and how that varies according to the
9 size of the transaction.

10 Q And I take it he was pointing to these data in support of
11 his contention that customers tailor their payment choices
12 based upon transaction size?

13 A Yes, he was, that's how he presented it.

14 Q What, if anything, looking at Professor Katz's chart, the
15 lines on the chart, what, if anything, is significant to you
16 about the lines here?

17 A Well, when I look at his chart, what I see is that there
18 are two upward sloping lines that look kind of similar, a dark
19 blue one and a light blue one, and those are check and other,
20 I think other is probably ACH and some things like that. And
21 then there's one that looks very different than all of them,
22 which is the red one and then that's cash. And then there are
23 two, the green and the purple one, that kind of have a similar
24 shape. They have different levels, but the different levels
25 just reflect the fact that they have different overall shares?

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1 But their shapes are pretty similar and those actually are
2 debit and credit.

3 So when I look at this chart, I don't think that
4 this is the easiest way to see what's going on in this data,
5 but when I look at this data, it suggests to me that, once
6 again, triangulating from multiple sources of data here seeing
7 the similarity between debit and credit.

8 Q Now, have you looked again at Visa payment data on this
9 very question?

10 A I have, yes.

11 Q Let's look at slide 30, please.

12 MR. CHESLER: And this also a confidential one, Your
13 Honor.

14 BY MR. CHESLER:

15 Q What -- without reciting specific numbers, what does this
16 chart show?

17 A So this chart shows the same kind of data. I think it
18 may even be the same data, but expressed in a different way
19 that allows more easy comparison of the size distributions for
20 different payment methods. So if I can't say the numbers,
21 it's a little bit difficult, but let me try to give an idea of
22 how to read this.

23 If you look at the horizontal axis, it has
24 transaction sizes. So look at \$25, and then look at that red
25 curve and the height of that red curve, you can read off of

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1 the vertical axis. And what that represents is the fraction
2 of transactions for that means of payment that are less than
3 or equal to \$25. Then if you go to up to \$50 and look at the
4 red curve again, it's higher. That's the fraction that are
5 less than or equal to \$50.

6 Now, the advantage of looking at these data this way
7 is it's removing the thing that makes those curves on the
8 previous slide really not that comparable. It's removing the
9 fact that the different means of payments have different
10 overall shares. Okay?

11 And what you're seeing here is that amongst these
12 four curves you've got the red one which is skewed in a way
13 that bows upward, leftward, and that means it's skewed towards
14 smaller transactions and that's cash. And then you have got
15 the one at the bottom that's quite flat, skewed rightward, and
16 that one is check. And then the other two are fairly close
17 together, the green one and the yellow one. Those are the
18 size distributions for GPCC and for credit, I mean and debit,
19 and those are generally quite similar. They're not exactly
20 the same, but again, when we're assessing substitutability in
21 markets with differentiated products, we are not asking
22 whether the things are identical. We're asking whether there
23 is substantial coherence, and here you see a pattern that
24 substantially coheres between those two means of payment.

25 Q Now, you also on the earlier chart when you talked about

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1 looking at recently available data, we have been talking about
2 recently available empirical data, both Visa spend data and
3 Boston Fed data, correct?

4 A Correct, yes.

5 Q You also indicated on that chart if we look at slide 28
6 for a moment. You also indicated that since the older Visa
7 litigations, you have been able to get access to evidence from
8 discovery taken in recent litigations and the first category
9 of that data are loyalty card data, correct?

10 A Correct, yes.

11 Q And have you, in fact -- first of all, explain to the
12 Court what do you mean by loyalty card data?

13 A So a number of the merchants have loyalty cards that
14 people use when they check out of the store. And when they do
15 that, the store collects a lot of information about them,
16 about their purchase, about their means of payment, things
17 like that, even what they purchase. That's very useful.

18 THE COURT: That's not quite a debit card. That's
19 just so that you can get the discounts?

20 THE WITNESS: That's correct.

21 THE COURT: So to speak?

22 THE WITNESS: That's correct. And you may use your
23 loyalty cards, but you're using a debit card or using an
24 American Express card or a MasterCard to pay.

25 The advantage of these loyalty cards is that the

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1 database that results from that allows us for the first time
2 to actually look at patterns of spending for particular
3 consumers at the same merchant.

4 Now, you know, we talked about the changes and what
5 we've learned about debit, this is the first time we have an
6 opportunity to look at data that allows us to test Dr. Katz's
7 tailoring theory directly. Dr. Katz's tailoring theory
8 suggests that for a particular use, people only use one kind
9 of payment method and he presents evidence that's suggestive
10 of that, saying well, this tends to be used in one spot and
11 this tends to be used at another spot.

12 Here for the first time with these data, we can
13 actually look at individual consumers using these payment
14 methods at the same place for comparable transactions and see
15 what they use, and find out whether Dr. Katz is right about
16 this tailoring theory.

17 MR. CHESLER: And, Your Honor, we're going to look
18 at a number of charts about loyalty data. I'm just mindful of
19 Your Honor's point about having a another matter. It's ten to
20 one. Is this a logical --

21 THE COURT: Yes, this would be a good time to break
22 for lunch and we will resume at two o'clock.

23 MR. CHESLER: Very well. Thank you, Your Honor.

24 THE COURT: Thank you, everyone. I'm just going to
25 go right into the next matter.

LISA SCHMIDT, RMR Official Court Reporter

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1 (Lunch recess.) (Continued on next page.)

2 (Whereupon, the afternoon session began at

3 2:00 p.m.)

4 THE COURT: I remind the witness you are still under
5 oath.

6 DIRECT EXAMINATION

7 BY MR. CHESLER: (Continued)

8 MR. CHESLER: Thank you, your Honor.

9 Q Dr. Bernheim, I want to go back to just one issue that we
10 obviously haven't spoken about but it relates to the question
11 the judge asked before lunch.

12 Your Honor, may I approach the witness with an
13 exhibit that's not in the book?

14 THE COURT: Yes, you may.

15 MR. CHESLER: Thank you.

16 THE COURT: A risk I take every time I ask a
17 question.

18 We'll end up with more exhibits in this case.

19 MR. CHESLER: So, your Honor, we have marked this as
20 Defendant's Exhibit 7830 for identification.

21 Q This comes from the electronic file which is the Fed
22 survey that we have been talking about. So we have printed
23 the first two pages just so it's clear on the record what it
24 is.

25 And Dr. Bernheim, on the third page of Exhibit 7830,

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1 at the top of the page there is a question that is labeled X
2 7582. And I represent to you in your report in this case,
3 that is the question which you cite on the chart that relates
4 to the debit/credit data that we were talking about before
5 lunch.

6 I just want you to look at that question because
7 it's relevant to a question the judge asked before lunch.

8 Just take a moment and read what 7582 asks or says.

9 (Pause.)

10 Q Do you see that, sir?

11 A Yes.

12 Q Do you see -- I just want the record to be clear, you see
13 the first part of the question says: "A debit card is a card
14 that you can present when you buy things that automatically
15 deducts the amount of the purchase from the money in an
16 account that you have (including government benefits such as
17 food stamps or SSI), if R reports institutions, do you or your
18 family living here use any debit cards," then it says, "If R
19 reports no institutions, do you or your family living here
20 have a card that allows you to deposit or withdraw money using
21 a cash machine or ATM," asks as a separate question, then it
22 gives a separate answer.

23 Do you recognize this as the question to which the
24 responses were the data that you were referring to earlier?

25 A Yes, it is. I didn't recall the wording. But yes, it

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1 is.

2 MR. CHESLER: Your Honor, I offer 7830. I just want
3 the record to be complete on what the question was.

4 MR. CONRATH: Did we get the slide number this
5 refers to? I think I know but I don't want to guess.

6 MR. CHESLER: Why don't I provide it to you at a
7 break just to save some time unless you need it for your
8 objection.

9 MR. CONRATH: No objection.

10 THE COURT: Defendant's Exhibit 7830 is received.

11 MR. CHESLER: Thank you, your Honor.

12 (So marked in evidence Defendant's Exhibit 7830.)

13 Q So Dr. Bernheim, I want to go back to the loyalty data we
14 were talking about before the luncheon break.

15 Are you aware that Professor Katz has suggested that
16 these data are not representative of merchants for purposes of
17 doing this analysis?

18 A Yes, I understand that he has said that.

19 Q And do you agree with that?

20 A I think that the purpose that I am using these data for
21 do not require them to be representative of merchants.

22 Q Why is that?

23 A I'm using them for a couple of purposes. One is to make
24 statements about consumer behavior. And these are large every
25 day spend merchants. I have no reason to believe that their

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1 customers are not representative of customers in general.
2 Whether the merchants are representative in terms of their
3 views of debit or credit isn't relevant to asking questions
4 about what consumer attitudes towards debit and credit are.

5 So I guess that is the first thing I would point
6 out.

7 The second thing that I would point out is that is
8 odd for Dr. Katz to criticize these data on these grounds
9 given that he himself has used the data.

10 In fact, if I recall correctly, a figure based on
11 these data was featured in the government's opening statement
12 without such qualifications.

13 So I think we agree that they can be used for some
14 purposes but I want to be absolutely clear about the purpose
15 or one of the main purposes that I am putting these data to,
16 which is to test Dr. Katz's theory of compartmentalization,
17 that people use particular payment methods at particular
18 places, they designate that they are going to use a card for
19 one thing, they use something else for another thing. That is
20 something that with these data, with these kinds of data for
21 the first time can be tested directly.

22 So now that we have data that allow us for a large
23 population of consumers to actually find out how consumers use
24 their payment methods, I think that these data shed a
25 substantial amount of light on the relevant issues.

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1 Q Before we go through some of the specifics gleaned from
2 the data, what is your ultimate conclusion with respect to the
3 issue about tailoring or compartmentalizing the use of debit
4 cards?

5 A I think that a look at these data leads one to the
6 conclusion very quickly that people are not somehow
7 compartmentalized into GPCC cards and in fact are switching
8 regularly, frequently between GPCC cards and debit.

9 Q Let's look at slide 31.

10 And, your Honor, this is confidential information on
11 it.

12 THE COURT: That is fine.

13 Q Without naming the merchants or the numbers, professor,
14 what does slide 31 show?

15 A So here we have five merchants for whom I have the
16 requisite data to examine these issues.

17 I looked at the loyalty customers who had at least
18 10 transactions. The reason for looking at loyalty customers
19 with at least 10 transactions is that we are interested in
20 determining how often it is that people switch or rather what
21 fraction of people switch between different payment methods,
22 we have to look at a reasonable number of transactions to
23 allow for opportunities to observe that switching.

24 If we look at a case where there is only one
25 transaction, obviously there be will be no switching. If

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1 there are two or three, the odds are fairly high that we will
2 happen to catch someone who is using the same means of
3 payment.

4 So it's important to look at people who have some
5 significant number of transactions in this database. So that
6 is the first thing to note about this.

7 For each one of those merchants, what I have
8 depicted here are 2 bars. The first bar, the green bar
9 represents the fraction of their loyalty customers who used
10 only GPCC as a fraction of those customers who used GPCC for
11 some transaction -- I'm sorry, that used -- yes, GPCC. This
12 is out of those who used GPCC or GPCC and debit. The two
13 groups here are people who used GPCC only and people who used
14 GPCC and debit.

15 So we begin with the set of people who used GPCC
16 cards and we are segmenting them into the ones who in the
17 transactions that we can observe, either only used GPCC or
18 also used debit.

19 And what we see in this figure is that out of that
20 group, and I can't say the numbers, but a very sizeable
21 fraction of these people, a sizeable majority of them use both
22 GPCC and debit, which is contrary to this tailoring theory,
23 disproves the tailoring theory I think quite directly.

24 I would add that these are counts of individuals and
25 if you did this based on the dollars in the transactions, it

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1 would be even more extreme because the customers who tend to
2 have the concentrated purchase on GPCC in the data have fewer
3 transactions, and that's why you are not seeing switching for
4 many of them.

5 So this is giving you a conservative idea of the
6 number of people who go back and forth in the data.

7 Q Now, you have a box sort of around the three merchants to
8 the left-hand side of the chart that says Professor Katz only
9 focused on three.

10 What is the significance of that?

11 A Well, Professor Katz also performed an analysis of these
12 data in addressing the same issue and this is just to indicate
13 that he focused on the three to the left. He explained in his
14 testimony that those were selected at random I guess from the
15 five since those were the firms, those were the merchants at
16 which this analysis could have been performed. And the way it
17 turned out, he missed the two at which there is the greatest
18 mixing of use of GPCC and debit.

19 Q Now, there was some form of loyalty data provided by more
20 than five merchants, isn't that true?

21 A That is correct.

22 Q So what did you mean when you said these are the five for
23 whom this type of analysis could be done?

24 A Doing this analysis requires more than just the loyalty
25 data. It also requires what is called BIN data, B-I-N for

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1 bank identification number, so that it's possible to link up
2 the individuals with some other data that allow us to
3 determine whether certain payment products that were used were
4 debit or GPCC.

5 So that's why I focused on five of the eight.

6 Q You indicated before that you put in your universe of
7 consumers those that had done at least ten plastic
8 transactions that used GPCC, is that correct?

9 A That's correct.

10 Q And the orange bar showed a percentage of those consumers
11 that also used debit at the same merchant during the same
12 period of time, correct?

13 A That's correct. And just as a footnote there, that is,
14 you shouldn't interpret the green bars as those who would
15 refuse to use debit. We simply don't know within the green
16 bars. They may be people who are perfectly willing to switch
17 or didn't happen to switch in the transactions that we
18 observed.

19 So that's why I think that the orange bars
20 are really -- the magnitudes of those bars are quite
21 remarkable.

22 Q You said Dr. Katz had done an analysis of this issue
23 looking at the three merchants on the left-hand side of the
24 chart, correct?

25 A That's correct.

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1 Q Was there any difference in the thresholds that were used
2 by you and Dr. Katz to determine which consumers would be
3 included the analysis of the data?

4 A Yes, there was.

5 Dr. Katz instead of imposing a threshold of 10
6 transactions to allow for sufficient observation of whether an
7 individual in fact was using both means of payment put the
8 threshold at only two transactions and consequently that
9 resulted in observing a higher fraction of people who
10 apparently did not use both means of payment.

11 Q Did you do a comparison of the results using a threshold
12 of two transactions versus the 10 that you used?

13 A I did.

14 Q Let's look at slide 32, please.

15 This is also confidential data.

16 What does slide 32 show?

17 A Slide 32 is for one of the five merchants. This is -- I
18 have similar comparisons for the other merchants but I'm just
19 illustrating this with one of the merchants and I can't
20 obviously say which one this is.

21 On the left-hand are my results for that merchant
22 from the previous side. Those are the same as before. And on
23 the right-hand slide are the corresponding results that Dr.
24 Katz derived using a threshold of only two transactions. And
25 you can see that using that lower threshold inflates

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1 significantly the fraction of customers who apparently are
2 using only GPCC.

3 Q What does it do to the percentage who are using both GPCC
4 and debit?

5 A It reduces that significantly, makes it much more even
6 between the two.

7 Q Now, staying with the fact that Dr. Katz did some work
8 with the loyalty data as well, let's look at slide 33, please.

9 This is also confidential data, your Honor, for one
10 of the merchants.

11 So without specifying the merchant or the numbers,
12 describe for the chart what Dr. Katz's chart shows.

13 And I think you've added some annotations to his
14 chart, is that correct?

15 A That's correct. This is essentially Dr. Katz's figure
16 but I've added some annotations.

17 Q When you describe for the Court what you intend to show
18 by chart, you should point out what significance if any your
19 annotations have?

20 A Sure.

21 So this is taking that same merchant that appeared
22 in the previous slide and the same 2 bars the green bar and
23 the orange bar, and Dr. Katz instead of presenting the data in
24 that form presented it in this form, which I find has the
25 effect of obscuring the underlying message.

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1 So the green bar is the same green bar as before
2 except it's on a different base and that annotation above it
3 "credit only customers" is my annotation.

4 Then that orange bar, he took the orange bar and
5 divided it into a bunch of BINS according to the percentage
6 spending -- the percentage that was spent on debit as a
7 percentage of total plastic spent.

8 So all of those little orange bars actually add up
9 to the orange bar that you saw in the previous slide where I
10 showed Dr. Katz's version of it, but visually, and this is why
11 I think it obscures the point, visually when you divide this
12 up into a whole bunch of BINs, it has the effect of making it
13 appear as if all those Little orange bars are small.

14 And in fact, if you add them up, the relative size
15 compared to green bar is exactly what I showed on the
16 right-hand side of the previous slide.

17 So the notation above that which says a percentage
18 of customers used both credit and debit, that is my notation
19 to indicate that all of those little bars correspond to the
20 larger orange bar on the previous slide.

21 Then finally, Dr. Katz added this yellow bar on the
22 right-hand side which I have labeled debit only customers, and
23 I'm not quite sure why this -- why for this purpose Dr. Katz
24 would have added that. Again, to me, it obscures the
25 underlying message of importance that comes from this data,

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1 which is the fraction of people who mix relative to the total
2 fraction who used GPCC.

3 If people use debit only, then they are not relevant
4 to the question of whether people will switch away from debit
5 to -- pardon me, switch away from GPCC to debit in response to
6 some price differential.

7 So consequently, I do not take the yellow bar as
8 being relevant to the question that we're asking, and this
9 presentation of the data therefore I think in addition to
10 having the problem of being based on a threshold of two rather
11 than 10, visually does obscure the important point.

12 Q Now, did Dr. Katz acknowledge that if you were looking at
13 switching from credit to debit, you would not focus on the
14 debit only customers, did he acknowledge that in his
15 testimony?

16 A That was certainly my interpretation of his testimony.

17 Q Let's look at slide 34.

18 We don't need to read it or pause on it.

19 Is that the testimony you were referring to?

20 A Yes, that was the testimony I had in mind.

21 Q We've been talking about switching from GPCC, general
22 purpose credit charge to debit. You earlier emphasized that
23 the first thing you wanted to look at was American Express,
24 correct?

25 A Correct. My analysis starts with American Express as the

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1 product of interest. And the question is where do you go from
2 there, what do you start including?

3 Q Did you look specifically at whether American Express
4 users in the loyalty data, when they do switch stay within the
5 general purpose credit charge category or switch to debit
6 within the same store for the same period of time?

7 A Yes, I did.

8 Q Let's look at slide 35.

9 This is also confidential data for the merchant,
10 your Honor.

11 What does slide 35 show?

12 A So again, this is -- now we have all eight merchants
13 because the BIN data were required for this exercise. And
14 what I am doing for each one of the merchants, is looking at a
15 transaction, finding the transactions in which they used Amex
16 to pay for the purchase. And then amongst those transactions,
17 looking at the fraction in which on the next transaction they
18 used something other than American Express. And that's
19 actually a very large fraction of the Amex transactions.

20 I'll show you that data in just a minute.

21 So this is the next transaction looking at the
22 people who used Amex and now what do they use on their next
23 transaction when they have shift away from Amex.

24 And I'm focusing on two alternatives here. One is
25 the fraction that shifted to -- the fraction that shifted to

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1 other GPCC on the next transaction and the fraction that
2 shifted to debit on the next transaction.

3 Q Without measuring the numbers, what is your general
4 conclusion from these data?

5 A So the yellow bars represent the fraction switching to
6 debit on the next transaction, the green bars, the fractions
7 switching to another GPCC on the next transaction.

8 What I'm doing is comparing the heights of those
9 bars for each one of the merchants and seeing that across the
10 board, they are very similar.

11 So what this is telling you is that when people
12 switch away from American Express, which they do pretty often
13 and you'll see that data in a minute, they switch to debit on
14 the next transaction as frequently as they switch to other
15 GPCC cards.

16 Q There has also been discussion about whether consumers
17 switch or don't switch to debit based upon transaction size.

18 Are you familiar with that issue?

19 A Yes, I am.

20 Q Have you looked at that question using the loyalty data
21 as well?

22 A Yes, looking at this with the exact same data in fact and
23 that's on the next slide.

24 Q Let's go to 36.

25 What does slide 36 show?

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1 A Slide 36 does the exact same calculation, just kind of a
2 footnote on the calculation that I forgot to mention earlier,
3 I'm showing you results that are based on transaction amounts.
4 So this is talking about this is dollar weighted.

5 I have separate results based on just transaction
6 counts and it looks very similar, but with that out of the
7 way, this is doing the same exercise but looking at what I
8 have defined as large purchases, and the way I defined large
9 purchases was for each merchant, I determined the median
10 purchase. So half the transactions are larger, half the
11 transactions are smaller and I just took the larger half of
12 the transactions separately and did the analysis again.

13 And if it were the case that somehow this was being
14 driven by the smaller purchases and people having a large
15 purchase in one instance and the small purchase in the next,
16 you would see a very different result here, but in fact, you
17 see the same result. Switching to debit and to other GPCC is
18 approximately -- happens with approximately the same rate
19 after using an Amex card when the individual switches to
20 something else.

21 Q Now you are aware that the government at some point moved
22 to preclude at least some portions if not all of your
23 testimony on these issues prior to trial?

24 A Yes, I'm aware of that.

25 Q And you read what the issues were that the government

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1 raised in support of that motion?

2 A Yes, I'm aware of the issues.

3 Q Let me turn to those fairly quickly.

4 One issue the government raised was that the data
5 did not necessarily reflect switching because sometimes
6 spouses or family members share cards and the data may relate
7 to what a family is doing, different members of the family are
8 doing from time to time rather than what a particular
9 individual is doing.

10 Are you familiar with that assertion?

11 A Yes, I am.

12 Q Did you look at that question in the data?

13 A Yes, I did.

14 Q Let's turn to slide 37, please.

15 What does slide 37 show?

16 A This is a fair question to raise and therefore it's
17 something that I investigated.

18 If it's the case that the switching that is observed
19 in this data is attributable to the fact that sometimes one
20 person does and uses the loyalty card and uses one means of
21 payment and some of the time another household member goes and
22 uses the card and uses a different means of payment but
23 neither of them are actually switching, that each individual
24 is sticking with the same means of payment, then if we focus
25 on single person households where this problem is going to be

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1 dramatically reduced, we should see much, much lower rates of
2 switching away from Amex.

3 And that's what we are looking at here. He could do
4 this for three of the merchants. Here we need additional data
5 which is some information about whether we have a single
6 individual or married individual, and this is comparing the
7 rates of switching away from Amex on the next transaction
8 according to whether we have a single person household or a
9 married individual or not single personal household I guess is
10 the alternative here, and you can see that the rates of
11 switching are approximately the same.

12 So the switching that is observed in this data do
13 not reflect -- cannot be attributed to different household
14 members using -- each using the same card but observing
15 alternation between who is making the purchases.

16 It's basically the same when you use data that at
17 least -- it's not perfect data, but it should reduce that
18 problem dramatically and it doesn't have a very large impact
19 on the amount of data observed.

20 Q You are aware there was also a issue raised about whether
21 the data addressed the reason for the switching? Are you
22 familiar with that?

23 A Yes, I am.

24 Q What is your position with respect to that?

25 A I'd like to just point out on the previous slide that the

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1 previous slide gives you some idea of the frequency with which
2 people shift away from American Express on any given Amex
3 transaction. It tells you the fraction of time that they move
4 away from Amex on the next transaction for those three
5 merchants. And I'm pointing to it as a preface to answering
6 this question because what it's showing you is that those
7 rates are quite high. I'm underscoring that because it's
8 telling you that this switching is a very common phenomenon.
9 So it's a phenomenon that is not occurring in response to
10 unusual events, it's happening all the time.

11 So the switching that we're seeing is switching that
12 is in response to the kind of variation conditions that are
13 normally present when someone goes to the store on Tuesday and
14 then goes to the store on Wednesday. Their mood may be a
15 little different. When they flip open their wallet, they may
16 see a different card or whatever but usually nothing very
17 dramatic is going on. These kinds of data are not perfect for
18 answering the questions about switching because ideally we
19 would like to measure price variation and all that and we
20 don't have it here. But it is showing us that for sort of the
21 naturally occurring variations in conditions that people
22 confront from day-to-day, they are switching with high
23 frequency. And that's an indication that their preferences
24 are actually not that strong between these different payment
25 methods.

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1 Q What about the role of credit limits and the costs of
2 revolving as being an issue with the loyalty data?

3 A I think that that could be potentially some issue in
4 certain cases where you have customers who are operating under
5 the lend centric model.

6 American Express customers we know generally don't
7 fall into that category. The spend centric business model
8 appeals to them. They are generally not revolvers.

9 So I think that problem as well is not something
10 that can account for these patterns.

11 Q What about the question of the data showing switching to
12 cash? Is that an issue for the data?

13 A So this also was raised. When you look at these same
14 results for switching to cash, you also do find switching to
15 cash.

16 I would point out that the amount of switching that
17 you see to cash on a volume related basis is certainly lower
18 and it's also much more uneven across the companies, so it's
19 not a robust pattern across the merchants.

20 So it's certainly weaker evidence. But the other
21 thing that is important to understand about the switching to
22 and from cash relates to what I said a minute ago about the
23 day-to-day variation in conditions that we confront when we
24 shop. You can imagine with cash, some of the time I show up
25 at the store and open my wallet and go oh, I don't actually

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1 have any cash and that causes me to use another means of
2 payment.

3 That is a larger change in condition that actually
4 in that case sort of forces me to change the means of payment.

5 So I didn't want to look, take these results and say
6 cash is in the market too because it seems to me that that
7 particular effect is likely driven, which is a weaker effect,
8 is likely driven in many cases by people not just having much
9 cash on hand.

10 Q What about the DOJ point that you are focusing
11 on consumer data and you should be looking at merchant
12 switching?

13 A I think that relates to the issue that we discussed
14 earlier when you showed the stipulation.

15 Certainly the experts in this case have all I think
16 agreed that the merchant demand for payment services is
17 derived from consumer demand and the government's theory is
18 that Amex has market power over merchants because consumers
19 are unwilling to switch.

20 So this speaks directly to those issues.

21 Q Let me turn to slide 38.

22 We're at the last bullet on the chart we have been
23 walking through, which is the changes in the last 15 years or
24 so.

25 And you say that you have also looked at documents

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1 and testimony in the record, is that correct?

2 A I have, yes.

3 Q What kinds of evidence have you looked at, sir, and what
4 is your characterization of it?

5 A I've looked at a lot of evidence. I know there has been
6 testimony at trial and there were depositions beforehand and
7 there are all sorts of documents produced in the course of
8 business.

9 My characterization of that is that the record on
10 this issue does not speak with one voice. The documentary
11 record and the testimonial record does not speak with one
12 voice. And that's one reason why I place a lot of weight on
13 doing my own analysis of this issue.

14 But I also think that in evaluating the documentary
15 record, from my own point of view as an economist, what I
16 tried to keep in mind was the context of the evidence.

17 And if I can elaborate on that?

18 Q Sure.

19 A There are two aspects of context that are important to
20 me.

21 One is time, when it happened, what time period is
22 being referred to. Because this is --

23 I made the point before. This has been a dramatic
24 transition in this industry.

25 Things have really changed. We know that debit is

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1 now used much more by many more people and they have a very
2 different perception of debit than they did 12 or 15 years
3 ago. And that has been an evolutionary process.

4 So when I think about the evidence, I tend to put
5 more weight on recent evaluations.

6 Then the other thing that has been important to me
7 as an economist as I evaluated the evidence is to me, the
8 context in terms of whether things are referencing
9 negotiations.

10 Q Why is that important?

11 A Because people take positions in negotiations that are
12 favorable to what they want to accomplish.

13 And so companies are always putting their best spin
14 on things. So evidence that is produced for use in
15 negotiations for the purpose of advancing negotiations, for
16 me, I discount that evidence in forming my own opinion, at
17 least to some degree. I don't ignore it but I put less weight
18 on it.

19 Q Let's look at slide 39. It relates to the documents and
20 testimony category that you have looked at.

21 Can you explain to the Court what your points are
22 here?

23 A Very quickly, and this is all in the record so I'm just
24 mentioning here some of the things that I have seen in the
25 record that have been more persuasive to me in suggesting

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1 something about the substitutability between debit and
2 credit.

3 And the first is internal documents from Amex as
4 well as accompanying trial testimony from Amex witnesses that
5 talk about the positioning of their charge products and the
6 development of new products that are being positioned as
7 competitors to debit, things like the Every Day card.

8 That indicates to me that there has been a
9 transition in this industry, an important transition where the
10 players in this industry are devising business strategies that
11 explicitly recognize that they are competing with debit.

12 And I think the second bullet point here is a
13 reference to the fact that there is some evidence about other
14 networks pursuing related kinds of strategies.

15 Q Just a few moments on Durbin.

16 We have heard a lot about the Durbin legislation.

17 Are you aware of Dr. Katz's conclusions relating to
18 credit and debit substitution based upon the Durbin Amendment
19 or the events following the Durbin Amendment?

20 A Yes, I am.

21 Q Do you agree with his conclusion?

22 A No, I don't.

23 Q I'll ask you at this point about a particular regression
24 analysis that Dr. Katz did.

25 Would you look at slide 40, please.

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1 A Yes.

2 Q What is the --

3 This is some testimony from Dr. Katz here at trial.

4 Are you familiar with the regression analysis that
5 he was referring to in his testimony?

6 A Yes, I am.

7 Q What did it show?

8 A Let me just give a word or two about background.

9 In Dr. Katz's testimony at trial when he was talking
10 about Durbin, he showed a figure illustrating the amount of
11 debit use and credit use over time and said at the point in
12 time that Durbin occurred, there wasn't a significant change.
13 And he was just pointing to it, saying look, you don't see
14 GPCC dropping off at that point in time.

15 Now, the problem is that if you want to do this
16 scientifically, you have just can't eyeball a figure like
17 that. The reason is that there are trends and there is some
18 tendency to continue a trend.

19 Dr. Katz himself in his report used appropriate
20 statistical analysis to try to take out the trend and to ask
21 what I think is the more appropriate question which is: How
22 did Durbin cause the use of GPCC and debit to deviate from the
23 trend?

24 He didn't talk about that in the trial testimony in
25 his direct but it did come up in cross and I think that this

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1 is the reference to the result which is that the regression
2 analysis indicates that Durbin decreased credit volume by
3 8 percent and caused debit volume to increase by about
4 16 percent.

5 So looking at Dr. Katz's own analyses, I think that
6 the conclusion that comes out of this is that Durbin did have
7 a very sizeable impact on the relative usage of these two
8 types of means of payment.

9 Q Is that significant impact particularly significant in
10 your view because of the issue of whether all merchants
11 paid less or some merchants paid less after the Durbin
12 Amendment?

13 A Yes, it is.

14 Q Have you looked at the question of the impact on merchant
15 fees from the merchant perspective with respect to debit
16 transactions following the Durbin Amendment?

17 A I have, yes.

18 Q Let's look at slide 41, please.

19 And, your Honor, this is not a confidential
20 document.

21 What does this slide show?

22 A So again, a word or two of background about what I'm
23 doing here.

24 Much of the discussion about Durbin I think has
25 created the impression that Durbin resulted in an across the

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1 board reduction in the cost of debit to merchants. And Dr.
2 Katz has characterized that as being very large.

3 The facts do not support that. And the way I
4 investigated this was by looking at data that was obtained
5 from a processor and using the data from the processor, it's
6 possible to determine the all in debit rates, the pre-Durbin
7 and post-Durbin. And when I say all in, that includes all the
8 relevant fees.

9 So one of the things that happened after Durbin is
10 some of the acquirers increased their fees to the merchants or
11 debit which offset some of the Durbin effects.

12 Now, you can see that there are two lines on this
13 figure; one a yellow line and one a green line.

14 The yellow line is simply taking the average of the
15 all in debit rate across all of the merchants that are served
16 by this processor.

17 And the noticeable thing about the yellow curve is
18 that its does not increase, it does not decrease by a very
19 noticeable amount when Durbin occurred which is the beginning
20 of that gray area on the slide. You can see it dipping very
21 slightly at the start of Durbin and then actually popping up
22 again after a few months again.

23 So if you just average over merchants in this large
24 sample of merchants that we were able to look at for the
25 processor, you don't actually see a decline in the cost of

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1 debit.

2 Now, how do you square that with what you heard
3 about Durbin reducing the cost of debit?

4 It reduced the cost of debit for large merchants,
5 very large merchants. So that when I weight by volume, I get
6 the green curve which is closer to the story that people have
7 been telling about Durbin reducing the cost of debit.

8 So the thing to understand about Durbin is that it
9 had a very concentrated effect on merchants. It was not a
10 great across the board reduction in the cost of debit that can
11 be used as a good natural experiment.

12 Knowing that, using Durbin as an experiment to
13 examine certain things like the fraction of merchants who
14 accepted debit or the fraction of merchants who accepted GPCC,
15 which is what I believe Dr. Katz showed in his direct, is
16 actually inappropriate because that ought to be driven by the
17 yellow line, not by the green line.

18 THE COURT: I'm sorry, there seems to be some
19 problem putting up the document on the screen.

20 I have it on, so I don't know what the problem is.

21 MR. BARBUR: This is a confidential document.

22 MR. CHESLER: I said it was not and it was?

23 THE COURT: And I'm worried about whether you can
24 see it.

25 MR. CHESLER: I'm looking at a hard copy.

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1 THE COURT: So am I.

2 I don't have any problem.

3 So the next document, let me hear from the experts.

4 Is the next document confidential?

5 It's not confidential, Mr. Chesler.

6 MR. CHESLER: Thank you, your Honor.

7 THE COURT: You are welcome.

8 All right, go ahead.

9 Q Now, before we get to the next document, Dr. Katz also
10 pointed out with respect to interchange fees on credit cards
11 that they didn't go down in response to a decrease in debit
12 card interchange after Durbin.

13 Is that a relevant factor in your view?

14 A I don't think that you can infer much from that at all.

15 Q Why?

16 A You have to remember that this is a two-sided market and
17 Dr. Katz is treating this as if it's a one-sided market.
18 There are a lot of other things going on here.

19 When the rates for debit come down, which they did
20 in some instances, that makes debit less profitable for
21 issuers, for banks and banks want to push in the opposite
22 direction, they want to push to where things are more
23 profitable for them.

24 So what happens in this market in response to
25 something like Durbin is that through the other side of the

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1 two-sided market, pressure is applied in the opposite
2 direction.

3 The interchange not going down can simply be a
4 reflection of the fact that the networks wanted to keep the
5 credit cards more attractive relatively speaking to customers
6 so that they would continue to use credit which is more
7 attractive to the banks.

8 So the incentives here are extremely complicated and
9 it is not clear in this two-sided market exactly what
10 implication you would be looking for in these data.

11 Q Are you saying it's possible that higher interchange on
12 credit can increase the usage of credit card?

13 A Yes, actually. Higher interchange can fund rewards and
14 so forth that increase usage of credit cards.

15 Q I'll ask you about a related but separate subject.

16 You had said that you believe the relative market
17 includes at least GPCC and debit, correct?

18 A That's correct.

19 Q So are there other constraints to consider in that
20 context?

21 A Sure. There are other means of payments and they
22 substitute to some degree, but what I would emphasize is that
23 this is a highly dynamic market with a lot of emerging
24 technologies and a lot of creative people who are trying to
25 find ways to introduce products that are attractive to

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1 customers.

2 THE COURT: Can I just ask this.

3 So all this having been said, does the existence of
4 the NDP have the net effect of making it more difficult for
5 the market to reach its natural equilibrium? In other words,
6 would the NDP where it is, it means that Visa and Mastercard
7 can, according to some of the testimony, increase rates closer
8 to the NDP and that would be not in the interests of the
9 merchants or possibly the consumers on the other side of the
10 two-sided market.

11 Isn't there -- if you didn't have the NDP, wouldn't
12 that encourage more competition between debit and credit and
13 maybe everyone will go to debit and there won't be a vibrant
14 credit card market at all?

15 THE WITNESS: So that is a very complicated question
16 and --

17 THE COURT: That's why I asked it, because I don't
18 know the answer.

19 I don't know how relevant it is to this discussion
20 but it would just seem to me that it flows from what is being
21 discussed here.

22 THE WITNESS: It's very relevant, your Honor, and
23 slowly we are winding our way there.

24 I am going to spend a lot of time there.

25 THE COURT: It's another 80 pages.

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1 THE WITNESS: It's a little hard to preview that.

2 THE COURT: That is all right. You say you are
3 going to get there.

4 THE WITNESS: I will.

5 THE COURT: I accept you at your word and I'll let
6 Mr. Chesler work his way through the next 80 pages.

7 MR. CHESLER: Thank you, your Honor.

8 THE COURT: Sorry I interrupted.

9 MR. CHESLER: No.

10 Q Let's go back to this issue about other competitive
11 constraints that may be in the market.

12 Are you familiar with Dr. Katz talking about PayPal
13 and saying it doesn't really compete with Amex because it just
14 piggybacks with Amex, Amex piggybacks on PayPal? Are you
15 familiar with that?

16 A Yes, I remember that testimony.

17 Q Did you look at that question?

18 A I did.

19 Q Let's look at slide 43 which is confidential, your Honor.

20 THE COURT: Confidential?

21 MR. CHESLER: Yes.

22 Q What does 43 show, professor?

23 A 43 is information on how PayPal purchases are funded.

24 And it has a time series here. Some of them are projections.

25 I believe this comes from PayPal.

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1 And what it's showing is the breakdown between three
2 categories. One is credit/debit. The other is ACH. And the
3 other is what is called PayPal balances.

4 Now the credit/debit part is indeed piggybacking on
5 the existing networks, although I suppose that it's worth
6 saying that piggybacking on the debit network to compete with
7 credit is one way that debit gets used to compete with credit.
8 So I'm not sure you should ignore all of the credit/debit part
9 of the bar.

10 But you can see that ACH is a very substantial part
11 of funding PayPal purchases. And then there is also that bar
12 at the top, PayPal balances, which it's a little bit
13 complicated to assess but as best I can tell, my current
14 understanding of that is that by and large, that is not
15 piggybacking on the network in the sense that Dr. Katz meant.

16 Q So you are saying that PayPal is in the relevant market?

17 A Well, not necessarily. I haven't made that
18 determination. The data on PayPal is very limited so I
19 haven't been able to study that.

20 I'm just pointing to this as an example of how in
21 this dynamic market, there is a lot of innovation and that the
22 innovation also includes methods that are getting around the
23 existing plastic networks.

24 Q Let's look at slide 44 as we move to a different market
25 allegation.

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1 This is the T&E market.

2 Do you have that slide, sir?

3 A I do, yes.

4 Q You say that the T&E submarket ignores spillovers and
5 cost differences.

6 Is that your view?

7 A Yes, that is correct.

8 Q So I want you to tell us what is it about the competition
9 in the industry as you see it that makes the carving out of a
10 market or submarket for travel and entertainment, merchant
11 services, network services inappropriate in your view?

12 A So I want to address this question of whether there is a
13 separate T&E market in kind of two stages.

14 One is on a common sense level, business reality
15 level, and then turn to the technical issue of the test that
16 Dr. Katz applies.

17 So starting with the common sense business reality,
18 one thing that we know about this industry is that the G in
19 GPCC is really, really important, the general, that if you
20 don't have a card that you can use generally, then you are
21 going to be confined to a very small niche, store cards and
22 things like that.

23 You need to have a very general purpose card in
24 order to compete. The history of this industry proves that.
25 We had networks that tried to operate in travel and

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1 entertainment. They tried to be a travel and entertainment
2 product and what happened to them? They died off. One of
3 them survived. That was Amex. And that one survived by
4 moving out of T&E into every day spent, by expanding and
5 becoming a general purpose card.

6 The business reality is that there isn't such a
7 thing as a T&E card that is viable in this market.

8 Q I'm going to skip over a reference to some testimony from
9 witnesses that is to that effect because it's already in the
10 record.

11 Let's go to slide 46, please.

12 You were just talking about American Express
13 surviving and what it did over time.

14 What does slide 46 show?

15 A This slide is showing how the composition of Amex's
16 charge volume between T&E and non-T&E merchants changed over
17 time.

18 So it shows the going back to the 1990s, it's fairly
19 evenly split in 1997. Then as you go forward in time and get
20 to 2010, T&E is down to about 30 percent of Amex's charge
21 volume. 70 percent is non-T&E.

22 So that is reflective of the transection. Amex
23 escaped the fate of Diner's Club by becoming a general purpose
24 card.

25 Q Let's move to what I think you called the more technical

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1 side of this question.

2 And you are aware that Professor Katz looked at the
3 issue of price discrimination in connection with his
4 definition of this T&E market?

5 A I am, yes.

6 Q Is that as a general matter, the use of price
7 discrimination to help to define market, is that generally
8 recognized as an acceptable approach?

9 A As a general matter, it is recognized as an acceptable
10 way to proceed.

11 Q Do you agree with the way in which Professor Katz applied
12 the principles of price discrimination to reach his
13 conclusions about a T&E market?

14 A No, I do.

15 Q Explain why not.

16 A To define markets based on price discrimination --

17 Q I'm sorry, let's also turn to 47 as you are doing this.

18 Sorry.

19 A So I think I talked about the first main bullet point
20 here, we're on the second main bullet point.

21 To do a price discrimination test that is required
22 to establish price discrimination in the market, it's
23 important that you have to be able to associate different
24 costs with different products that are different, delivered to
25 different customers.

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1 So you have to be able to say this customer got this
2 product and these are the costs associated with that and
3 another customer got this product over here and here are costs
4 associated with it.

5 And the costs associated with the first product
6 aren't associated with the second product and the costs
7 associated with the second product aren't associated with the
8 first product. Then you can look at the price cost markups
9 and if they are different, you can reach an inference that
10 there is some price discrimination.

11 Now, you asked me what the problem with that is.
12 The problem with that is related to what I said about the
13 business reality in this industry. You can't escape the
14 business reality by doing a technical test. The business
15 reality is that everything in this business is interrelated.

16 Q What do you mean by that?

17 A So let me take an example.

18 Take something that seems like it could easily be
19 ascribed to T&E, something like just the cost of clicking the
20 interfaces with the T&E merchants. That seems like something
21 that could be allocated to T&E.

22 Well, if you think about it from the narrow
23 perspective of how you treat costs when implementing a
24 technical price discrimination test, actually it's not so
25 simple. And the reason is this. If you didn't incur those

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1 costs, didn't hook up any of the T&E merchants, you would have
2 a card that wasn't usable in T&E. And if you have a card that
3 is not usable in T&E, then you don't have a viability card.
4 Then nobody uses the card.

5 So incurring those costs to hook up the T&E
6 merchants, actually they are delivering benefits to you
7 everywhere in your network, and therefore those costs for the
8 purpose of this kind of analysis which is a technical, narrow
9 application, a very technical, narrow analysis, the point is
10 that you can't really allocate the costs.

11 There are other costs that are just joint costs to
12 begin with. I gave an example of something that was directly
13 associated with T&E. In one of my reports I went through
14 things that are joint costs that aren't easily allocated but
15 for the purpose of Dr. Katz's analysis, he simply took the
16 counting allocation that Amex used for putting together one of
17 their databases.

18 Again, that may be appropriate for the purposes that
19 Amex is using it, incentivizing different business divisions
20 and things like that, but this is a different purpose. This
21 purpose is performing a price discrimination test for a narrow
22 purpose and that allocation has to be governed by these
23 principles of causality that those don't respect.

24 Q Let's take a more generic cost, say writing off unpaid
25 balances on charge cards, an example that is not unique to T&E

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1 like hooking up the terminals at an airline.

2 A So let me give you an example of the difference between
3 how you would have to think about this from a economic
4 perspective and how it's done from an accounting perspective
5 for the purpose of allocating those costs. Just a
6 hypothetical example to illustrate the point.

7 You have somebody who goes month-to-month only with
8 every day spent. And they are spending well within their
9 spending limits, they don't default. At some point they
10 decide I have to go on a vacation so they splurge and they
11 spend a ton of money on the vacation and in one month they
12 have a lot of T&E expenses.

13 Because of that, they have really put themselves up
14 against the wall financially and they are having a hard time
15 making the ends meet. They manage to pay off the card for
16 that month but because they are so far behind, they default in
17 the next month when they only have non-T&E expenses.

18 From a causal point of view, the T&E expenses caused
19 the default, but from the point of view of costs allocation,
20 that's not how it's done and that is the problem.

21 Generally, it's just extremely hard to determine
22 what caused something like a default on a card. And so for
23 accounting purposes, arbitrary allocations are used.

24 But for the purpose of performing this kind of test,
25 that is just not appropriate.

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1 Q So what is the bottom line here in terms of the ability
2 to identify a market based on price discrimination that relies
3 on differing margins, allocation of costs of revenue to get
4 differing margins?

5 A It just can't be done. Attempts to do it are
6 inconsistent with the business reality. At some point the
7 technical test has to confront the business reality and the
8 business reality is you can't carve off a piece of a GPCC
9 network and have it operate as a viable business model. And
10 if you do the technical test right, it's consistent with that
11 because you can't allocate the costs.

12 Q Let's go to slide 48 which is just a revisit to the chart
13 I think we began with, the summary of your conclusions because
14 I want now to move to the issue of market power.

15 So the second of the three major bullets on your
16 conclusion chart is the evidence refutes the claim that Amex
17 possesses antitrust market power?

18 A Yes.

19 Q Now, are you familiar with, and I don't want to spend
20 time going back over it, so I just want to see if you are
21 familiar with Professor Gilbert's discussion of technical
22 market power versus antitrust market power?

23 A Yes.

24 Q Do you agree with what he said on that subject?

25 A Yes, I do, I think that is a generally accepted

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1 distinction.

2 Q We'll come back to that issue in due course but I wanted
3 to save a little time by not going through the same material
4 again.

5 Would you turn to slide 49, please.

6 A Yes.

7 Q So what was the framework for your analysis with respect
8 to market power?

9 A This slide lays out three steps which I followed in order
10 to evaluate market power.

11 (Continued on next page.)

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1 BY MR. CONRATH:

2 **DIRECT EXAMINATION (Continued)**

3 BY MR. CHESLER:

4 Q Antitrust market power?

5 A Yes.

6 Q Now, you're familiar with -- and I don't want to spend
7 time going back over it, so I just want to see if you're
8 familiar with Professor Gilbert's discussion of technical
9 market power versus antitrust market power?

10 A Yes, I am.

11 Q And do you agree with what he said on that subject?

12 A Yes, I do. I think that's a generally accepted
13 explanation.

14 Q Okay. We'll come back to that issue in due course, but I
15 wanted to save a little time by not going through the same
16 material again.

17 Would you turn to slide 49, please?

18 A Yes.

19 Q So, what was the framework for your analysis with respect
20 to market power?

21 A This slide lays out three steps which I followed in order
22 to evaluate market power, and would you like --

23 Q Why don't you just walk through quickly what those three
24 steps are?

25 A Sure. The first one is to identify a competitive

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1 baseline. What we want to do in some sense is to evaluate
2 whether prices look like they are reflecting the exercise of
3 market power. If we can identify an appropriate competitive
4 baseline, then that comparison becomes easier to perform.

5 So in doing my analysis, I concluded that the period
6 of the 1990s and very early 2000s, particularly the 1990s is a
7 period during which Amex clearly lacked any meaningful
8 antitrust market power, and so I take that as a baseline.

9 MR. CHESLER: Your Honor, I should have pointed out,
10 this and some charts that will follow are not confidential
11 charts.

12 BY MR. CHESLER:

13 Q Okay. What is the second step?

14 A Well, the second step is to analyze the conduct, Amex's
15 conduct since the competitive baseline, what's happened since
16 then, and what I'm going to show is that since that period of
17 time, Amex has lowered its price, properly measured, while
18 simultaneously increasing its quality, enhancing its quality.
19 And if a firm didn't have market power at a particular point
20 in time and after that point in time acquired market power,
21 what you'd expect is that they would be raising prices or
22 alternatively, holding the prices constant while reducing
23 quality.

24 Amex went in the other direction. It reduced its
25 prices. It increased its quality. That's the sign of

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1 competing more aggressively, not less aggressively as a firm
2 with market power would try to.

3 Q And what's the third step in your framework?

4 A The third step is to go through the specific claims that
5 the government and Dr. Katz have made concerning the reasons
6 why they think Amex has market power and to address each of
7 those.

8 Q Okay. So, let's start then with the competitive baseline
9 and turn to slide 50, please. What does slide 50 show?

10 A Slide 50 shows Amex's share of GPCC volume, purchase
11 volume, from 1990 to 2002. And to be clear, the reason that
12 I'm focusing on GPCC here and not including debit is because I
13 think that there's an agreement that at this point in time
14 debit probably was not in the market. So I'm focusing on
15 GPCC. And what you see here is that Amex's market share
16 declined pretty steeply in the early 1990s and then around
17 1995, flattened off and its share stagnated.

18 Q Now, is the focusing on the period of time when the share
19 loss took place, '90 to '95, is that necessarily inconsistent
20 with a finding of antitrust market power?

21 A A decline in market share is not necessarily consistent
22 with the absence of market power, no. For example, you could
23 have a firm that starts with 90 percent, where it declines to
24 85 percent and stays there and you'd still be pretty worried.

25 Q So what, if any, significance do you ascribe to the share

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1 decline depicted here from about 24 percent to about
2 19 percent?

3 A Well here, the magnitudes are actually are pretty
4 telling. Amex's market share declines to below 20 percent and
5 remains stagnated through this period, from 1995 all the way to
6 2002, at or right below 20 percent. This is not a level of
7 market share where economists are normally very concerned
8 about market power sufficient to maintain unilateral effects.
9 So, this is a fairly low market share during that period.

10 Q Is there some additional significance to the fact that,
11 as you said, it stagnated for about seven or eight years
12 fluctuating at or about 20 percent, 19 percent?

13 A Well, it's significant in the sense that Amex during this
14 period of time was not able to regain any market share.

15 Q Now, did you read Mr. Chenault's testimony about what he
16 called the double chokehold that he believed his company was
17 in during this period of time?

18 A Yes. The double chokehold on the one hand, the
19 exclusionary -- the exclusionary agreements, the exclusionary
20 rules concerning issuance, MasterCard and Visa had those rules
21 with the bank issuers on the one hand, and on the other hand,
22 there were the preference campaigns and particularly the "We
23 Prefer Visa" campaign, but those are the things that he was
24 referring to.

25 Q Now, is that subject, this double chokehold subject,

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1 significant at all in your analysis about market power here?

2 A Well, I think it is. When I review that record, what I
3 see is a company that is kind of on the ropes. By the time
4 you get to some of the statements in the record, some of the
5 documents and speeches by Mr. Chenault, it's clear that Amex
6 is a company in trouble at that point in time. It's a company
7 that is not in a position to somehow extract monopoly rents
8 from this market. It wouldn't be struggling otherwise.

9 Q Is it possible for a firm to be a victim of the exercise
10 of antitrust market power by another firm and still possess
11 such market power for itself?

12 A I suppose in principle, yes. Although in that case, I'd
13 expect to see them exercising their market power by
14 retaliating in kind, and in terms of doing where was the --
15 you know, the "We Prefer Amex" campaign having equal or at
16 least some comparable success in the market.

17 Q Now, Mr. Chenault and some other witnesses have also
18 testified about advantages that they believe Visa and
19 MasterCard derived from distribution of their cards through
20 their retail chains and through the exclusionary rules. Are
21 you familiar with that?

22 A Yes, I am.

23 Q What significance, if any, does that have for your
24 analysis?

25 A Well again, this was a measure that I think by all

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1 accounts significantly weakened Amex as a competitor.

2 Q Now, I'd like you to look at two slides that have some
3 excerpts relating to the U.S. v. Visa litigation. Fifty-one
4 has an excerpt from the government's post-trial findings in
5 the Visa case and from its trial brief, and 52 has an excerpt
6 from Dr. Katz's direct testimony in the Visa case about which
7 he commented in his trial testimony here. Do you have those?

8 A I do, yes.

9 Q What significance, if any, do these statements have for
10 your effort to establish this baseline period as the first
11 step in your market power analysis?

12 A Well, I don't want to put words in anyone else's mouth.
13 Dr. Katz can testify it for himself, but I think both of these
14 documents -- these documents and statements are acknowledging
15 that Amex's ability to compete was limited during this period.
16 And that is not typically a statement that one makes about a
17 firm that has significant market value.

18 Q Let me turn to a separate subject. You said that since
19 that period of time, since this baseline period that you have
20 identified, American Express has lowered its price -- prices
21 properly defined, isn't that what you said a few minutes ago?

22 A Correct.

23 Q So, let's talk about that issue, and if you will, let's
24 turn to slide 53 just so we have the context. This is the
25 second step in your framework, analyze the firm's conduct

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1 since the competitive baseline, is that correct?

2 A That's correct.

3 Q Okay. So again, what is the significance of Amex
4 lowering its price and improving quality in the period since
5 the baseline period?

6 A Briefly I think I said this before, but the idea is if
7 Amex began without market power, prices at a particular level,
8 subsequently reduced prices, increasing quality, that's an
9 indication that any share that they were gaining subsequently
10 they were accomplishing that by competing aggressively
11 effectively, an exercise of market power would have manifested
12 itself through some sort of a price increase.

13 Q Now, I think you were careful to say a price properly
14 defined. How do you define the proper price to look at for
15 purposes of this market power analysis?

16 A So this goes back to a point that I made at the beginning
17 of my testimony when we were discussing the nature of Amex's
18 product, and I emphasized the point that a key feature of
19 Amex's product transaction services is that it's a single
20 service that is being provided simultaneously to two parties.
21 It's not like providing advertisements to advertisers and
22 magazines to people who want to read them, where you can vary
23 the two things separately. Here, this is hard wired. There
24 is one transaction. And its a one service, two parties are
25 being charged for it. So the price of this has to be defined

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1 as what's called the two-sided price. I think there's been
2 testimony about that already.

3 Q And have you looked at this issue? Have you looked at
4 data relating to this issue of the two-sided price?

5 A I have, and could I just elaborate one other thing
6 concerning my previous answer?

7 Q Yes.

8 A Once of the reasons why it's really important to look at
9 the two-sided price rather than either side separately relates
10 to this issue of -- we were talking about it a minute ago,
11 which is why I wanted to come back to it. Price is relative
12 to costs.

13 Dr. Katz's price discrimination test, he's saying
14 that prices have a different relation to cost across different
15 sectors, which means different amounts of market power being
16 exercised in different sectors, that's his view, and that
17 underscores the important point that you can't even begin to
18 talk about market power unless you can define costs.

19 Market power is defined relative to a competitive
20 benchmark. The competitive benchmark comes from costs. Now,
21 if there is only one service and it's being provided
22 simultaneously to a consumer and to a merchant, there is no
23 way to divide up the cost of providing that service between
24 those two parties that's economically meaningful. There's one
25 cost, and the only way to evaluate whether there's market

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1 power is to compare the one price to the one cost.

2 Q And do you have a chart that shows essentially the
3 formula that you used to do that?

4 A Well, what I'm doing is looking at the prices here, and
5 here we're looking at --

6 Q Wait. You're saying "here," I think we need to go to 54?

7 A I'm sorry. Am I on the wrong slide?

8 Q I hope not. Do you have 54 in front of you now?

9 A I do, yes.

10 Q Let's explain what it is you're doing here on slide 54?

11 A On slide 54, I'm explaining how the two-sided price is
12 calculated. And this just gives the simple formula. So the
13 formula is saying that what I'm doing is adding together
14 what's being paid on each side of this market, what's being
15 paid by the merchant, to what's being paid by the consumer.

16 So, for the merchant we have the merchant fees, and
17 then offsetting that, we have some fees -- some payments that
18 are made to merchants. Those have to be netted out so that we
19 know net what Amex charged the merchants, and then we have to
20 add to that what Amex charged the consumers.

21 Well, in fact, Amex has charged consumers is
22 negative because Amex gives rewards to consumers and that
23 means value is flowing to consumers. And this is
24 well-recognized in the literature on two-sided prices that
25 sometimes the price charged to one side of the market or the

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1 component of the price charged to one side of the market can
2 be negative.

3 So we add those up and then in order to determine a
4 measure of how large this is, I scale this by the net charge
5 volume. So we have expressed the total amount that Amex is
6 charging as a fraction of its total charge volume, and that's
7 the definition of the two-sided price.

8 Q I notice that in the line -- on the line that talks about
9 payments to card members, second from the bottom section, you
10 talk about the cost to Amex of rewards earned by card members
11 for use of the card such as membership rewards, cash back
12 corporate rebates, correct?

13 A Yes.

14 Q You're aware that Dr. Katz has taken the position that
15 one should -- if one is going to calculate a two-sided price,
16 one should look at the value of the rewards on the consumer
17 side rather than the cost to Amex of those rewards?

18 A Well, I understand that he said that, yes.

19 Q Is that, in your view, the correct way to calculate the
20 two-sided price?

21 A No.

22 Q Why not?

23 A I mean, that's inconsistent with standard antitrust
24 analysis. When we're calculating a price for any good for the
25 purpose of doing this kind of analysis, we ask what did the

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1 seller receive for it, not what value did the customer attach
2 for it.

3 If I'm a merchant selling milk and the price of milk
4 is two dollars, I sell the milk for two dollars, we want to
5 know whether that price of two dollars is inflated relative to
6 the competitive benchmark. What the consumer values this at,
7 the fact that the consumer might have been willing to pay five
8 dollars for the carton of milk because they really need milk.

9 It's just not relevant to this calculation at all.
10 So I'm extremely puzzled by Dr. Katz's claim. It seems just
11 contrary to basic antitrust principles.

12 Q You recall we talked very briefly about the fact that
13 Professor Katz had done a Hypothetical Monopolist Test when he
14 was doing his market definition exercise. Do you have recall
15 that?

16 A Yes.

17 Q Now, when he did that and he was netting numbers out of
18 his calculation, did he use cost or value when he did that?

19 A He used cost.

20 Q Let's look at slide 55. Is this an excerpt from his
21 testimony where he talks about the fact that he netted out
22 cost of rewards in doing his SSNIP test?

23 A That appears to be what it is, yes.

24 Q And would you agree if you had the quantitative data,
25 that you should, in fact, be using cost, not value, for this

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1 purpose as well?

2 A Absolutely.

3 Q So let's look at slide 56. Talk about what you actually
4 did with respect to calculating a two-sided price.

5 MR. CHESLER: And this one, Your Honor, is
6 confidential. Thank you, Your Honor.

7 BY MR. CHESLER:

8 Q What does slide 56 show without going into the particular
9 numbers on it?

10 A I will be careful not to say the numbers. So here we
11 have just tracking over time, how the two-sided price of
12 Amex's payment services -- I call it the economic price of
13 payment services, how that's changed over time. And the
14 magnitudes are percentage of the charge volume again, and you
15 can see here that it has fallen steadily and by substantial
16 amount since my baseline period, since 2002. That total
17 decline, I can't say what it is in terms of basis points, but
18 I think they said it would be okay to say that this is about a
19 25 percent decline in the price over this period of time.

20 Q That period of time being from '02 to 2010?

21 A That's correct.

22 Q And this economic price, as you call it, was calculated
23 using the formula that we looked at a few moments ago?

24 A That's correct.

25 Q Now, I believe Dr. Katz has said that your calculations

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1 incorporate some changes in internal accounting methodologies
2 within Amex and that's problematic for the calculations. Do
3 you recall that criticism?

4 A I do.

5 Q Can you respond to that, please?

6 A Well, there are two things that Dr. Katz pointed to, one
7 is that Amex periodically incorporates into these data changes
8 in assumptions about redemption rates by card holders for
9 their rewards points. And I don't agree with him concerning
10 his assertion that that's a problem with these numbers. I
11 think that incorporating those changes is exactly the right
12 thing to do.

13 When the redemption rates actually change, that
14 changes the cost of giving the rewards, and, therefore, it
15 squeezes Amex's profits.

16 So, the changes in the ultimate redemption rate,
17 which is the relevant perimeter here, the fact that that was
18 incorporated into the accounting figures over time, that's
19 exactly what should be done, so far as I'm concerned, and I
20 think that there was some testimony at trial that talked about
21 how that is an economic reality for them.

22 Q That being the increase in ultimate redemption rates?

23 A Yes, that's correct.

24 Q And having the increased reserves to account for that?

25 A Yes, that's correct.

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1 Q What about the other accounting change that Dr. Katz
2 raised, what was that?

3 A The other accounting change was a change that happened to
4 the -- Amex had something they called the GMAPS database and
5 there was a change in -- between 2008 and 2009, that, if I
6 remember correctly, related to some rewards accounting to
7 bring it in line with some of their other financial databases,
8 that were based on the general ledger. So at that point in
9 time, there was a change in accounting and G maps.

10 Q Okay. Now, did you look at alternative sources from
11 American Express in order to, in effect, do a sanity check on
12 the economic price you calculated in light of the criticisms
13 that Dr. Katz leveled?

14 A Well, sure, I mean that was one sanity check, another is
15 just to look and see that both before and after the change,
16 the economic price and payment services was declining. It's a
17 very robust pattern. We're only talking about what happened
18 at a particular point in time.

19 Q Before you go there, which is -- on looking at chart 56,
20 which is the particular point in time where those accounting
21 changes that Dr. Katz pointed to took place?

22 A It is between 2008 and 2009.

23 Q And so what does your calculation show for the period
24 from '02 up to '08 and for the period from '09 to '10?

25 A Significant decline up to that point, significant decline

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1 after that point.

2 Q Okay. Let's go to the subject of having looked at
3 alternative data sources as an additional sanity check. Would
4 you turn to slide 58, please?

5 A Yes.

6 Q No, I'm sorry, 57. I jumped ahead by one.

7 MR. CHESLER: Fifty-seven. This is a confidential
8 one, Your Honor.

9 BY MR. CHESLER:

10 Q What does 57 show without mentioning the particular
11 numbers?

12 A This figure is just showing some alternative calculations
13 I did with other financial databases. There are two other
14 financial databases that Amex has, one of them an Oracle
15 database, the other one is called TM1.

16 There is one line here based on the TM1 database,
17 which does not have the same accounting change that Dr. Katz
18 is worried about. The other one is -- what I did was, take
19 the Oracle database and use it to make an adjustment to the
20 change in the GMAPS, the economic price and payment services
21 that I calculated based on the G maps data that I showed you
22 on the earlier slides. I just made that change between 2008
23 and 2009. I modified it based on what happened according to
24 the Oracle data, neither the Oracle data, nor the TM1 data are
25 contaminated by this issue.

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1 So these are two different ways of looking at the
2 data that are not vulnerable to Dr. Katz's concern. You can
3 see while there can be some dispute about the amounts that the
4 economic price and payment services decreased by a particular
5 points in time, doing it different ways. The robust pattern
6 is that this was declining. And that's consistent, I think,
7 with the testimony that I read from trial from the Amex
8 witnesses.

9 Q Okay. So, we've been talking about what you call the
10 economic price, which is this two-sided price. You've shown
11 these various calculations of it, all of which are declining
12 over time. Did you also then look at the each of the two
13 sides, the merchant side and the consumer side?

14 A I did, yes.

15 Q So, let's look at slide 58.

16 MR. CHESLER: This is another confidential one, Your
17 Honor.

18 BY MR. CHESLER:

19 Q What does slide 58 show?

20 A So here I'm just looking at the consumer side and just to
21 emphasize, I don't view this as the appropriate way to analyze
22 market power in this market because I don't think that you can
23 talk about, you know, monopoly price premiums for either of
24 these components separately.

25 But here, I'm focused just on the consumer side, and

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1 this figure is showing that there's been a large increase in
2 expenditures on Amex rewards over time. The orange bars here
3 are showing dollar amounts. And the dollar amounts are
4 indicated on the left-hand side of the diagram, I won't read
5 any of them. The red line is showing the -- these -- these
6 reward expenditures as a fraction of charge volume and that's
7 measured over on the right-hand axis as percentage of charge
8 volume. I won't mention those numbers either, and you can see
9 that in both cases there's been a considerable increase in
10 expenditures on rewards.

11 THE COURT: Okay. Now, has Amex has gone from a T&E
12 based system to a mixed system, if you will, with general
13 spend. Would you expect that the price would be going in a
14 downward direction as a result of that?

15 THE WITNESS: The mix issue is important. And I
16 think we're going to come to some calculations in just a
17 little bit where I'll break out T&E and non-T&E separately and
18 show you what's happening in each one of them.

19 THE COURT: All right. And changes that occurred as
20 they moved from T&E card to a mixed use card?

21 THE WITNESS: Well --

22 THE COURT: Now, it's a general purpose card?

23 THE WITNESS: Yes.

24 THE COURT: But it started out, as you pointed out,
25 as a T&E card, and obviously, the management understood or

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1 believed correctly that the T&E card, it has limited uses and
2 viability?

3 THE WITNESS: Right.

4 THE COURT: So you're going to get to that
5 discussion?

6 MR. CHESLER: We're going to show the effects of
7 mix, Your Honor, and what happens when you take that variable
8 out.

9 THE WITNESS: So I'm going to try to address that by
10 doing it that way --

11 THE COURT: Oh.

12 THE WITNESS: -- and cutting these things
13 separately, but just to add, you know, we're looking here from
14 2002 forward. And we had that figure earlier, I'm just
15 wondering if I can find it very quickly without spending too
16 much time on this.

17 THE COURT: Well, let's see. Why don't you keep on
18 going. I'm sure that --

19 THE WITNESS: Yeah.

20 THE COURT: -- someone will find it over at that
21 table you share with Mr. Chesler, who will then remind you
22 about it, and then you will tell me. That's how this works,
23 apparently. There's a circle of the case.

24 THE WITNESS: Can I step out of the circle if I did
25 find it?

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1 THE COURT: Well, you're stuck.

2 BY MR. CHESLER:

3 Q Which slide are you looking at, Professor?

4 A I'm look at slide 46.

5 Q Good that you did that, because the string connecting the
6 Campbell soup cans here has been cut off. Which slide is it?

7 A Forty-six, this slide 46.

8 Q Why don't you flip back to 46 for a moment?

9 THE COURT: Sure.

10 A And I just wanted to point out the figures that I was
11 showing you were for 2002 forward, and the reason that I
12 wanted to pull this slide up, is that this shows the mix of
13 T&E versus non-T&E over time, and what it's showing you is
14 that in 2002, Amex -- I can't quite read straight over, but it
15 looks to me like Amex was already about 63 percent non-T&E,
16 and about 37 percent T&E. And it's risen since then to
17 70 percent, 30 percent, so there's been some continuing
18 change. But over the time period that we're looking at now,
19 2002 to 2010, most of that dramatic transition to being a
20 general purpose card was already -- had already taken place.

21 THE COURT: Thank you.

22 BY MR. CHESLER:

23 Q Now, if you did treat this market as a one-sided market,
24 you have been very clear that that's not appropriate, it's a
25 two-sided market. But if you did treat it as a one-sided

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1 market involving a network services to merchants, as Dr. Katz
2 suggested, would that render the two-sided price analysis that
3 you've been talking about irrelevant to the assessment of
4 market value?

5 A No, I don't think.

6 Q Why not?

7 A Well, look, you can't ignore the consumer side of this,
8 so if you're going to try to treat this as a one-sided market,
9 which I do not think is the right thing to do, and Dr. Katz
10 said it's either one, two-sided market or two, one-sided
11 market, I do not agree with him at all.

12 If you tried to use a one-sided market perspective,
13 and I don't think anyone has tried to work this out in the
14 economics literature thoroughly, but if you did that, I think
15 you would have to say that the other side of the market is
16 part of the cost picture of serving the side of the market
17 that you're focusing on.

18 So if you're focusing on the merchant side, then the
19 consumer side is part of the costs of serving the merchants,
20 and if that's the case, everything that I'm netting out here
21 as part of the price from the consumer side would just get
22 netted out anyway as costs. I mean, it can't vanish. It's
23 part of Amex's economic reality that it's -- what it's taking
24 out of purchase volume is shrinking as a percentage. Whether
25 you call it cost or price or anything else, it's getting

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1 squeezed.

2 Q Okay. We've looked at various measures of the two-sided
3 price. We just looked at data relating to the cost of rewards
4 and the rewards liability over time. Did you also look at --
5 just at the merchant's side in this context?

6 A I did, yes.

7 Q So let's turn to slide 59.

8 MR. CHESLER: This is also confidential, Your Honor.

9 BY MR. CHESLER:

10 Q What does 59 show?

11 A Fifty-nine shows my calculation of what I've called
12 Amex's net merchant discount rate, and that is the net
13 payments to merchants, showing what happened to this over time
14 since the early 2000s, starting in 2002, and again, I'm not
15 dealing with the mix issue yet, but I will address that
16 shortly, and I can't say what the numbers are, but you see
17 here that there has been a decline over time. It's not as
18 dramatic a decline as we saw for the economic price of payment
19 services, the two-sided price, but it is still a notable
20 decline.

21 Q Okay. Now, let's go to the mix question related to the
22 judge's question. And there's been an issue about mix and
23 what effect mix has on the calculation of merchant discount
24 rates. You're familiar with that issue?

25 A Yes, I am.

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1 Q All right. In that context, would you look at slide 61,
2 please. Do you have 61?

3 A I do.

4 Q What does 61 show?

5 A Sixty-one shows a separate calculation of the net
6 merchant discount rate for T&E merchants and for non-T&E
7 merchants. The white line on the bottom is for the non-T&E
8 sector, and once again, you can see the decline. The gray
9 line at the top is for the T&E sector. There it's a little
10 less even. There is a period of time where it goes up a
11 little, bit but then it comes back down and it, too, ends
12 below where it started.

13 There's a third line which is the orange line. Now,
14 the orange line is an overall average, but it's not the same
15 overall average that I showed you before. It's an overall
16 average that removes the effect of mix. So it's averaging the
17 white line and the gray line, but based on the relative
18 importance of T&E and non-T&E in 2002, I used the weights from
19 2002 and applied them in every year, so now the change in the
20 average can't depend upon any change in mix. And you can see
21 that the average comes down, again, modestly over this period
22 of time.

23 Certainly, there's no indication that this component
24 of price has been rising.

25 Q So by fixing the relationship as of 2002, you've removed

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1 mixes of variable for the period covered by the chart, is that
2 fair?

3 A Fixing the weights that I'm placing on T&E and non-T&E, I
4 removed the effects of mix on the overall average.

5 Q Now, did you also look at whether -- staying again just
6 with the merchant side of this two-sided price -- did you look
7 at whether discount rates for particular merchants -- there's
8 been testimony from a number of merchants about what's
9 happened to their discount rates over time during the trial --
10 did you look at whether the discount rates to specific
11 merchants had increased or decreased over time?

12 A Yes, and this is another way of addressing the mix issue.
13 If I'm looking at a particular merchant, and the change in the
14 discount rate for that merchant is not going to affect the
15 change in mix. So what I did was took the top thousand
16 merchants for Amex and then examined how their rates changed
17 between 2002 and 2010.

18 Q So let's look at slide 62, please.

19 MR. CHESLER: Confidential data, Your Honor.

20 BY MR. CHESLER:

21 Q So what does slide 62 show without going through the
22 numbers -- stating the numbers, I should say?

23 A Right. I'm glad you reminded me.

24 So, naturally over time you have got -- you have got
25 a lot of merchants here. For some of them, rates are going to

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1 go up and some of them rates are going to go down, but what
2 this is showing you is that the fraction for which the rates
3 went down is substantially larger than the fraction for which
4 it went up.

5 Q Can you give us and the Court some examples of the
6 merchants whose rates actually declined on a
7 merchant-by-merchant basis during this period of time from '02
8 through '10? Do you have a slide for that?

9 A Yeah, I think that's the next slide in my --

10 Q Let's go to the next one. So what is the significance of
11 this list of merchants on slide 63?

12 A Well, this is just a collection of the merchants from
13 that part of the pie chart that were merchants who had their
14 rates go down between 2002 and 2010.

15 Now, in a couple of cases, you know, they're some
16 issues, I know we're going to go come to them, about co-brand
17 agreements, and there are a couple here. I think Delta is on
18 here. It's the first one -- jet Blue at the bottom. Those
19 had co-brand deals with Amex, and I believe there's one or two
20 others that may have had GNS co-brand deals with Amex, but the
21 bulk of these are ones that did not.

22 Q So, Professor, do you reconcile what you have just said
23 about Amex's merchant discount rates coming down even if you
24 just look at one side of the two-sided price? Do you
25 reconcile that with the testimony we've heard here in court

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1 from some merchants who came in and testified that their rates
2 during this period of time have gone up?

3 A There is nothing to reconcile. As I said, the data show
4 that for one very large group of merchants, the rates went
5 down. And then for another smaller group of merchants, the
6 rates went up. But that smaller group of merchants still
7 includes a fair number of merchants, so it is of course
8 possible to cull a group of merchants from that set, and they
9 will testify that their rates went up. But that is not a
10 scientific sample. I mean, what happened overall is displayed
11 by the data that I showed.

12 Q So let's look at one analysis that Dr. Katz did on
13 pricing, which is slide 60, just jumping back a moment.

14 So this has confidential information on it as well.
15 Without saying the numbers, what does this chart from Dr. Katz
16 show with respect to the merchant discount side of the
17 two-sided price?

18 A This figure is a counterpart to one of my figures. And
19 it's showing the -- a T&E only merchant, net merchant discount
20 rate. A non T&E merchant discount rate. Average merchant
21 discount rate. And then an overall average. And the only
22 difference between this and the figure that I showed is
23 that -- well, I'm sorry, the only -- there's a couple of
24 differences, one is how we calculate the merchant rate. I
25 know we're coming to that.

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1 But the other difference is that the overall average
2 here is not one that adjusts for mix the way that my overall
3 average did, this is just a straight year-by-year average.

4 Q Okay. So the line at the top, the red dotted lines,
5 that's Dr. Katz's calculation of merchant discount rate for
6 T&E merchants. Is that right?

7 A That's correct.

8 Q Okay. And then the bottom line is non T&E and the blue
9 line in the middle is his average?

10 A Correct.

11 Q Okay. So you said a few moments ago we were going to
12 come to a discussion of co-brand remuneration. Is there a
13 particular difference in your view, significant difference
14 between what went into your calculation of discount rates, and
15 what went into or didn't go into Dr. Katz's calculation of
16 discount rates?

17 A The main difference is how we treat co-brand
18 remuneration. I net out co-brand remuneration in my
19 calculations. He does not net it out in his. I believe that
20 there are some other minor differences, but they don't have an
21 appreciable effect on the calculations. This is what
22 primarily drives the difference and the difference is really
23 concentrated in T&E.

24 Q So the major impact between his calculation and yours of
25 including or excluding co-brand remuneration is in the T&E

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1 line. Is that right?

2 A Yes, it explains why his T&E line goes up after 2006,
3 whereas my mine goes up a bit and then comes down.

4 Q And obviously you must believe that the inclusion of the
5 co-brand remuneration is appropriate because you did it. Why?

6 A Because I think that after reviewing the business reality
7 of how these negotiations occurred, the way that Amex operates
8 appears to be that they negotiate an entire relationship with
9 these partners with whom they have the co-brand agreements.

10 They -- for internal purposes they try to keep
11 things separate in divisions and have different divisions do
12 different things and so they try to draw certain lines. But
13 it -- based on the testimony, I concluded that these
14 negotiations span all of the aspects of the relationship
15 between the parties. And it's not uncommon for them to ask
16 for compensation for something that's occurring in one spot,
17 to be put in another spot. They're negotiating their entire
18 relationship.

19 Given that that's the case, it doesn't make a lot of
20 sense to chop this up and say that some portion that has
21 nothing to do with merchant payments.

22 Q Okay. I am going to just mention but not spend time on,
23 in the interest of time, slides 64 and 65. Are those examples
24 of record evidence about this overall negotiation practice
25 that you have just talked about, these relating to Starwood

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1 and Delta?

2 A Yes. Starwood and Delta are examples that come to mind.

3 Q Okay. Now, you also said in earlier comment that the
4 two-sided price was coming down throughout this period and at
5 the same time quality of Amex's product was improving. Do you
6 recall that?

7 A I do, yes.

8 Q What's the basis for that position that that quality was
9 improving?

10 A There had been a lot of changes in Amex's offerings, what
11 it delivers, it works very hard to deliver more value to
12 customers as well as delivering services to merchants, and I
13 believe that there is a lot of testimony about that that's
14 already in the trial record. And, you know, I'm inclined not
15 to repeat that, but that's the kind of thing that I've seen.

16 Q Okay. So, let's go to your chart that's been moving us
17 through the framework of your antitrust market power analysis.
18 If you turn to 66, I think we're up to the third major bullet
19 in that framework, which says assess basis for claim that firm
20 possesses antitrust market power, government's and Professor
21 Katz's arguments not supported by evidence or economic logic.
22 And the first sub-bullet there says, "Amex's market share is
23 not indicative of market power."

24 Let's address the question of shares since that's
25 the first one that you have mentioned and I'd like you to look

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1 at slide 67, please.

2 A Yes.

3 Q This is a somewhat different market share chart from the
4 one we looked at before, correct?

5 A It is, yes.

6 Q What does this one show, slide 67?

7 A This is share of GPCC and debit, so debit is added in
8 here, of course debit makes relatively little difference in
9 the early years. And probably doesn't belong there in the
10 early years. But, as I've explained, I believe that this
11 market ought to be defined to include debit. So, it is the
12 appropriate share in the later years.

13 Q Now, you are aware, are you not, that in the U.S. v. Visa
14 case, MasterCard was found to have market power at a time when
15 it had a share of general purpose credit and charge spend of
16 about 25 percent?

17 A Yes, I am.

18 Q Have you considered looked at the question of whether or
19 not that finding is relevant to your conclusions about
20 American Express not having market power in this case?

21 A Yes, I have.

22 Q Let's look at slide 68.

23 So what is slide 68?

24 A Well, this slide lists a number of observations that
25 relate to very important difference between Amex today and

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1 MasterCard at the time of U.S. v. Visa.

2 MR. CHESLER: And, Your Honor, this is not a
3 confidential slide.

4 BY MR. CHESLER:

5 Q So the first entry says that Amex's share correctly
6 calculated is much lower than MasterCard's current or past
7 share?

8 A Yes, that's what we saw on the previous slide. Amex's
9 share of what I considered to be the appropriately defined
10 relevant market is on the order of 13 or 14 percent. And
11 that's at a level that it would be extraordinarily unusual to
12 be concerned about unilateral effects with such small shares,
13 that's not typically recognized as being indicative of having
14 significant market power.

15 Q Now, the second entry on slide 68 refers to a situation
16 which even if debit were excluded from market, what -- what's
17 your point there?

18 A Well, I understand that there is an argument here about
19 whether for the purpose of technical market definition, debit
20 should be included in the market or not included in the
21 market. The point is, that even if we're not included within
22 the technically defined market, that doesn't mean that it's
23 unimportant.

24 That doesn't mean that the growth in debit and the
25 convergence between debit and credit and the growing

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1 substitutability between debit and credit are unimportant.
2 All of those things are extremely important. You see ample
3 evidence in the record of increasing competition between debit
4 and credit. Increasing concern from the credit networks about
5 competition from debit.

6 So to be comparing the share of GPCC at a time,
7 26 percent share of GPCC at a time when debit was not really
8 any threat, to a 26 percent share at a time when debit, even
9 if it's not technically in the market, is imposing a very
10 measurable and important competitive check. That comparison
11 is inappropriate.

12 Q Third item on the chart says that, "Amex considerably
13 lags MasterCard in areas that the U.S. v. Visa court noted as
14 relevant for power"?

15 A Correct.

16 Q You mentioned share of transactions and share of cards.
17 Is that right?

18 A Yes.

19 Q Let's take a moment at look at a slide about the share of
20 transactions. Look at slide 69, please. What does slide 69
21 show?

22 A I find slide 69 fairly remarkable. This is showing the
23 share of transactions accounted for, GPCC transactions
24 accounted for by Amex and MasterCard in 1999 and in 2012, and
25 this one is not confidential, is it?

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1 Q No, it's not.

2 A Oh, it's on the big board, I can talk about it.

3 So you can see that in 1999 it was 15 percent for
4 Amex and 28 percent for MasterCard, a very sizable discrepancy
5 between the two. The remarkable thing for me is that that
6 really hasn't changed very appreciably at all. It's pretty
7 much today what it was in 1999.

8 Q What about share of cards, we don't have a slide about
9 that, but, does Amex still lag MasterCard in terms of the
10 share of cards that are in force in the United States?

11 A It does, I didn't commit the numbers to memory, but it's
12 still far behind MasterCard in that department as well.

13 Q Now, if you go back to slide 68 again, the fourth item
14 says, unlike members, MasterCard had and still has ubiquity of
15 acceptance and issuance?

16 A Yes.

17 Q We heard a lot have evidence about those numbers, we
18 don't need to go through them again, but that is accurate
19 statement so far as you're concerned?

20 A As far as I know, yes.

21 Q And then the 5th item says that Amex has no ability to
22 exclude competitors as MasterCard had, what do you mean by
23 that?

24 A Well, the thrust of the case in U.S. v. Visa was that
25 Visa and MasterCard were using the exclusionary rules to

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1 exclude competition which is an indicator of market power.

2 It's one of the definitions of market power. I don't think

3 that there's any allegation that Amex has engaged in that kind
4 of exclusion.

5 Q And what about last item, Amex's current standing in
6 whatever market one considers resulted from cutting price and
7 improving quality. That's the point you have been talking
8 about for some time now?

9 A Yes, so I think Dr. Katz showed that Amex's share of GPCC
10 increased from 20 percent in the 1990's to about 26 percent
11 today. And if you just looked at that and that by itself, you
12 might ask the question, gee, is that rising market share a
13 reflection of market power, but when you see a change in
14 market share you have to ask where it came from. And if it
15 came from a company competing more aggressively, then that's a
16 not a bad thing and that's not an indication of market power.

17 So if you see Amex gaining market share because it's
18 reducing its prices and improving its product, well, that's
19 exactly what competition is supposed to do, you're supposed to
20 be rewarded for doing those things by gaining some share.

21 Q Okay. So if we go then to slide 71, we're moving down
22 through your assessment of the government's arguments that the
23 next argument is that relates to Amex's pricing, we just
24 talked about market share, and your bullet says that Amex's
25 pricing does not demonstrate market power, correct?

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1 A Correct.

2 Q Now, I think the government referred to several
3 pricing-related issues. Are you familiar with the assertions
4 concerning value recapture?

5 A Yes, that's one of them.

6 Q Are you familiar with the assertions about a price
7 premium, an Amex price premium?

8 A Yes, I am.

9 Q Are you familiar with the assertions in this context of
10 Amex price discrimination --

11 A Yes.

12 Q -- related to the power question?

13 A I'm sorry, yes, I am.

14 Q All right, so let's talk about value recapture first and
15 I like to turn to slide 72, please.

16 Bottom line, what is your conclusion with respect to
17 the value recapture as evidence of Amex market power?

18 A I don't think that value recapture has anything to say
19 about Amex market power. Value recapture is about a firm
20 adjusting its prices. Firms adjust their prices, whether
21 they're competitive or not. I don't think anything in the
22 evidence distinguishes what Amex was doing from situations in
23 which firms adjust their prices.

24 Q So let's look at the points on this slide, slide 72.
25 First one says, "One-sided analysis does not provide useful

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1 information on the key questions in this case." What does
2 that refer to?

3 A That refers to an issue that we've already discussed so
4 I'll pass over it quickly. The idea is that the to assess
5 market power, you have to be looking at the two-sided price.
6 You can't be looking at a component of the two-sided price for
7 this industry, given that it's one indivisible good, and say
8 something about whether market power is being exercised.

9 Q Okay. Next item says, "Companies profitably adjust
10 prices up and down all the time. It's not a reflection of
11 antitrust market power." Is there anything about that other
12 than what the statement says that you need to expound on?

13 A Statement is pretty clear, I would just add that I think
14 that it would be dangerous to accept evidence that affirm
15 increased prices at some point in time as an indication that
16 it has market power. That opens the door to finding that all
17 sorts of firms have market power in contexts where they don't.

18 Q How about the next item that Amex contracts with millions
19 of merchants and Professor Katz has found some whose rates
20 went up over time?

21 A Right. So I showed you earlier on the breakdown of what
22 happened to the merchants that I looked at, whether the rates
23 went up or down, over somewhat longer time period, 2002
24 through 2010, and I explained that a significantly larger
25 fraction of them went down than went up.

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1 Now, that's true during this narrower period, too,
2 that there was a mix, that for some, the price would -- did I
3 say prices, I meant merchant fees, I'm not being careful.
4 There was some for which the merchant fees went up and some
5 for which the merchant fees went down. During this period of
6 time, it was slightly tipped towards a bit more going up than
7 going down, but there were still a lot of firms that were --
8 experienced merchant fee reductions during this period. And
9 as we saw in this slides that I've already shown, the overall
10 average actually did not go up. It continued to go down very
11 slowly.

12 Q Let's look at the last item on this value recapture
13 chart. It says Discover (3 percent share) profitably raised
14 rates to many merchants, including large T&E merchants during
15 the valuer recapture time period."

16 First of all, to what does the three percent share
17 refer?

18 A Well, that refers to Discover's overall share of GPCC,
19 and debit has about 6 percent share of GPC. So about half
20 that for GPCC plus debit.

21 MR. CHESLER: And the next slide, Your Honor, is
22 confidential.

23 BY MR. CHESLER:

24 Q It relates to the last point about Discover raising rates
25 to many merchants. So let's look at slide 73. Without

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1 mentioning the numbers or the merchants, Professor, what does
2 slide 73 show?

3 A So slide 73 is intended to be kind of a reasonableness
4 check on this analysis that infers that Amex had market power
5 because it raised merchant fees to certain merchants during
6 the value recapture period. The reasonableness check is
7 performed by taking Discover, which I think we can all agree
8 did not have market power. I believe that Dr. Katz even
9 testified that he doesn't think that Discover has market power
10 and I agree with him about that.

11 So let's see what happens if we perform the
12 government's and Dr. Katz's same test for Discover during the
13 same period of time. And what you see is that the merchant
14 discount rate -- there's a whole bunch of airlines listed
15 here. And you can see that systematically, the merchant
16 discount rates are generally higher -- not in every case --
17 but in almost every case for Discover, just as they were
18 higher with Amex.

19 If this does not justify an inference that Discover
20 had market power, which I think would be an inference that is
21 not sustainable, it is hard to imagine how the same pattern
22 could logically lead to the conclusion and justify the
23 conclusion that Amex has market power.

24 Q Let's go to the second of the pricing issues. We talked
25 about value recapture. Let's talk about the issue of a price

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1 premium.

2 First of all, when the government and Dr. Katz talk
3 about an Amex price premium, are they looking at the right
4 price?

5 A No. They're not looking at the two-sided price. Again,
6 they're not look at a price. They're looking a component of
7 the price. They're looking at the merchant discount rate.

8 Q At the risk of -- well, let's not repeat ourselves. Not
9 enough time to -- spent a lot of time on repetition.

10 Does the issue of product differentiation matter in
11 connection with looking at a price premium?

12 A Without a doubt, yes. I mean, if you see two products
13 that the prices are different for -- let's say you observed
14 that a Cadillac has a higher price than a Toyota. You can't
15 look at that and say, oh, well, Cadillac is supervising market
16 power because they have a Cadillac premium. That's not
17 sufficient. You just can't look at the prices and know that
18 there is a price differential.

19 I think there is a lot of testimony -- has been a
20 lot of testimony at trial about the differentiated nature of
21 Amex's product, the value that it adds, and in a context where
22 you had differentiation, simply comparing price is is not the
23 right thing to do.

24 Q What about the issue of perception in the industry of
25 what the prices are relative to each other, Visa and

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1 MasterCard prices as compare to Amex. Does that have any
2 relevance to the issue of price premium?

3 A Yes. This is actually a very interesting issue. I have
4 seen the allegations that Amex has a price premium, and so set
5 about to investigate that systematically, and discovered that
6 there's lot of misinformation about the relationship between
7 Amex's merchant fees and Visa and Discover's merchant fees.

8 Q Let's look at slide 74. Without reading the testimony
9 that's here, what is this intended to show?

10 A Slide whoops -- 74?

11 Q Yes, sir.

12 A Oh. So this is referring to the fact that -- I guess we
13 didn't say this -- the reason that there appears to be
14 misinformation on this point is that Visa and MasterCard's
15 merchant fees are extremely complex, and it is very hard for a
16 merchant to figure out exactly what they're paying. And this
17 testimony is -- from trial is basically making that point.
18 These are different merchants saying that this is very
19 difficult to do. They don't do it. It would be very hard to
20 do.

21 Q Did you actually look at any invoices acquirer or
22 processor invoices on this question of Visa and MasterCard
23 price complexity?

24 A Yes, I did.

25 Q Let's look at slide 75. This is confidential.

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1 Without stating numbers, what is the significance of
2 this, as far as you are concerned?

3 A Well, the significance of is this is illustrates how
4 complicated the MasterCard and Visa fees are. There are
5 several breakouts here, and you can see the first thing that
6 we have broken out is a little box on the upper left-hand
7 corner. There's a blowup over towards the right. And that
8 appears to be stating discount rates. There's a discount rate
9 for MasterCard, one for Visa, one for Discover. There
10 actually isn't one for Amex here, because this particular
11 processor was simply passing through all of the charge
12 information to Amex for Amex to bill. So they didn't provide
13 that number. They weren't keeping track of that.

14 But in this case, those numbers that appears in that
15 top left-hand corner, those are simply starting points for the
16 rates that Visa and MasterCard charge. And when you look at
17 the other boxes that are broken out here, you can see that
18 there are all sorts of Visa and MasterCard fees that are
19 layered on top of this and that makes this extremely hard to
20 sort through.

21 Q In viewing the evidence about actual rates charged, did
22 you find many instances in which Amex rates were actually
23 lower than Visa and MasterCard?

24 A Yes. In fact, what I discovered was that this is by far
25 the predominant pattern for smaller firms.

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1 Q What is "this" in that sense?

2 A This means that the Amex all-in merchant discount fees
3 are lower by and large for smaller firms than the rates that
4 MasterCard and Visa are charging.

5 Q Did Professor Katz comment on your observation about the
6 fact you've just stated?

7 A Yes, he did.

8 Q Would you look at slide 76, please? What is slide 76?

9 A Slide 76 is something from one of Dr. Katz's reports in
10 which he's remarking on this finding that I had reached, and
11 he concludes this finding is not a surprise.

12 Q So we've talked about some aspects of the price premium,
13 or the allegation about a price premium. What is -- based
14 upon your review of the record, what is your understanding
15 about whether there is today an Amex price premium -- again,
16 looking only at this one side of the two-sided price that you
17 have repeatedly said is the right place to look?

18 A My --

19 Q What is your understanding of the current state of the
20 record on whether there's a price premium, in any event?

21 A Sorry. My understanding is that the record indicates
22 that the price premium has vanished once one considers what's
23 called the mix adjustment. The mix adjusted premium is gone.
24 When you compare -- when you make comparisons between
25 comparable Amex and Visa and MasterCard products, there is no

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1 longer a premium.

2 Q And we won't pause on slide 77, which is just several of
3 the excerpts in the record that refer to that vanishing
4 premium.

5 What -- Professor, what is your view the
6 significance to Professor Katz's conclusion about price
7 premium-based market power from the fact that on a
8 mix-adjusted basis, there no longer is such a premium?

9 A Well, this is an interesting point. Dr. Katz in his
10 report has an analytic framework for thinking about the
11 relationship between market power and the Amex premium. He
12 actually has a mathematical model that describe that
13 relationship.

14 And so one can interpret the Amex premium in light
15 of the model that he is using to frame his analysis. And
16 literally, in the context of his model, if Amex has a zero
17 premium, that means Amex does not have market power.

18 Q Now, are you aware of Professor Katz's testimony that
19 suggests that Amex's limited merchant acceptance is itself a
20 reflection of the exercise of market power?

21 A Yes. I am.

22 Q Do you agree with that conclusion?

23 A No, I don't.

24 Q Why not?

25 A Well, there are a couple of reasons. The first reason is

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1 that I think that -- well, I think Dr. Katz's position on this
2 is contradictory. Let me explain why.

3 Dr. Katz has said that -- that separately, we
4 haven't talked about this issue yet -- but that 3 million
5 merchants that don't accept Amex are by and large smaller
6 merchants. Now, we just covered the testimony where he agreed
7 with me. He said it wasn't surprising that smaller merchants
8 have a negative Amex premium. That is, their Amex rates are
9 actually lower than Visa and MasterCard's rates.

10 So if they don't -- if they aren't -- Dr. Katz's
11 theory is that they're not accepted at these places because
12 Amex is charging a premium. In fact, Amex is not charging a
13 premium at the smaller merchants. It is a negative premium.

14 There is separately evidence connected with many of
15 the merchants that don't accept Amex that indicates more
16 directly is that the reason that they don't accept Amex is
17 that they just don't see much value because they don't see
18 much relevance, that Amex just is not used very much at their
19 kind of store and in their kind of territory.

20 MR. CHESLER: Your Honor, I have one other pricing
21 related issue to cover, then I'm going to go to the subject of
22 insistence. If we could just have a few moments, it might be
23 a good time for break.

24 THE COURT: Why don't you do that last. We'll have
25 a few more minutes of pricing and then you're going to go to

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1 insistence?

2 MR. CHESLER: Yes, Your Honor.03

3 Q So do the pricing and then we'll take a quick break.

4 MR. CHESLER: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (Continued on the next page.)

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1 DIRECT EXAMINATION (CONT'D.)

2 BY MR. CHESLER:

3 Q Let's go to the subject of price discrimination. We've
4 talked about Value Recapture, we've talked about price
5 premium. Let's just talk briefly about price discrimination.

6 Do you agree with Dr. Katz's position that there's
7 evidence of American Express antitrust market power because it
8 engages in price discrimination?

9 A No, I don't.

10 Q Why not?

11 A This would just be a repetition of the points that I've
12 already covered with respect to price discrimination.

13 Q In the context of your discussion of the T&E market?

14 A Exactly, it is the same point. There's no meaningful way
15 here to do an assessment of market power based on a price
16 discrimination test anymore than there is a meaningful way to
17 do a market definition based on a price discrimination test,
18 it's the same issues.

19 Q Now, in the discipline of economics is price
20 discrimination more commonly associated with what you
21 previously identified as, and Professor Gilbert identified as
22 technical market power or antitrust market power?

23 A Definitely technical market power. There are all sorts
24 of examples of price discrimination. It's extremely common to
25 have some price discrimination in markets. So, generally,

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1 simply demonstrating market power, I think most people would
2 say it's -- most economists would say that's an indication of
3 technical market power.

4 Q Can you give the Court an example of where a firm can
5 price discriminate but does not have antitrust market power,
6 relating to Durbin, for example?

7 A Sure, Durbin, we know that many merchants did decrease
8 the price, the cost of debit to the merchant. So, think about
9 those merchants. We also know that those merchants, though
10 they are able to, they don't charge consumers different prices
11 according to whether the consumers are paying with debit or
12 with credit even though their costs are different. That
13 means, according to Dr. Katz's definition, that they are price
14 discriminating and so if you accept price discrimination as
15 proof of market power, you would have to conclude that every
16 single one of those merchants has market power.

17 MR. CHESLER: Your Honor, this is a logical break
18 point.

19 THE COURT: All right. Let's take a ten minute
20 break.

21 (Recess taken.)

22 (Continued on next page.)

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1 THE COURT: Please be seated.

2 All right. You may continue your examination of
3 your witness.

4 MR. CHESLER: Thank you, Your Honor.

5 Your Honor, I'm told that I've done something which
6 I have a wont to do, I misspoke on one matter earlier, I said
7 that that survey question, Defendant's Exhibit 7830, I said it
8 was from the Boston Fed survey. That was not the survey we
9 were talking about when you asked the question and it was not
10 the survey from which the question came. It came from the
11 University of Michigan survey that we looked at earlier, so I
12 apologize for that.

13 THE COURT: Thank you for clarifying that.

14 CROSS-EXAMINATION (CONT'D.)

15 BY MR. CHESLER:

16 Q Insistence, Professor, let's move to a different
17 subject. If you look at Slide 79, the last bullet on that
18 page, it says, "Insistence is not a source of antitrust market
19 power."

20 Is that in fact your opinion?

21 A I'm sorry, I was on the wrong side. Now I'm at the right
22 place. Yes, indeed it is.

23 Q All right. So, I'd like you to turn to Slide 80 which
24 addresses the issue of insistence.

25 A Yes.

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1 THE COURT: Do we need to have this --

2 MR. CHESLER: This can be publicly displayed.

3 THE COURT: -- published?

4 MR. CHESLER: Yes, Your Honor.

5 THE COURT: Go ahead.

6 Q So, the first entry says that, "Buyer preference is not a
7 source of market power if a company has to make investments in
8 order to earn preferred status and if other firms can
9 replicate those investments."

10 Other than what is self-evident from the statement,
11 can you explain to the Court what you're getting at here.

12 THE COURT: Do you have it?

13 THE WITNESS: Yes, and I think that this is a
14 principle, a basic economic principle that other -- that
15 Professor Gilbert in particular addressed so I won't spend
16 much time on it but I did want to clarify an issue that
17 Dr. Katz referred to when he spoke about this same principle
18 which is that he said, well, if a firm has preferred status,
19 say a pharmaceutical firm has a pharmaceutical product that
20 they developed and have preferred status, it's a better drug,
21 then it doesn't mean that they don't have market power
22 simply -- it doesn't mean that they don't have market power
23 simply because they invested in creating the drug because they
24 may have patent protection so that others can't develop the
25 drug too. And I think that's absolutely right. That's why

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1 I'm trying to be explicit here in saying that the principle,
2 and I think it is a principle that economists agree to, the
3 question is whether the result -- whether the investments that
4 created the preferred status with the customer, whether those
5 investments are replicable. If they're not replicable, not an
6 instance like there's a patent, then it might be a source of
7 market power. Here, however, the investments that gave rise
8 to loyalty by Amex customers are replicable investments.

9 THE COURT: I mean a patent is a form of market
10 power that's legislatively created --

11 THE WITNESS: Yes.

12 THE COURT: -- as an exception to, you might say,
13 to antitrust considerations for a period of time at least.

14 THE WITNESS: Precisely, precisely, it's a provision
15 that allows for the creation of the market power.

16 THE COURT: So, even if another company could
17 replicate the product, they're not at liberty to do so because
18 the product has statutory protection.

19 THE WITNESS: Precisely and that's why the market
20 power exists in that instance. In other cases where there
21 isn't statutory protection and companies can replicate what
22 the other companies are doing, the economic principle is you
23 don't get market power by virtue of making those investments
24 because others can copy what you're doing which is the essence
25 of competition.

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1 Q Now, moving to the second bullet.

2 Based upon your review of the record, have American
3 Express's competitors in fact replicated, made efforts to
4 replicate the types of investments that American Express has
5 been making to earn preferred status among customers.

6 A Absolutely. That's been part of the impact, the
7 competitive impact of American Express is to cause the other
8 networks to mimic their successful business strategy, their
9 successful products and they've made similar investments to
10 develop competing products. That's been what's going on and I
11 think that some of the Amex witnesses testified that, you
12 know, they have to work hard to stay ahead of the game, to
13 stay one step ahead of that.

14 Q What about the next entry, it says, "Issuers are already
15 engaged in steering by competing directly for cardholder
16 loyalty."

17 Explain that please.

18 A Yes. This is an interesting point about insistence.
19 What Dr. Katz calls insistence and actually what Amex has
20 called insistence is actually a form of steering, it's Amex
21 steering customers directly by incentivizing them to use the
22 Amex card, Amex payment products. The direction -- using
23 incentives to direct the customers to use the card, that's an
24 expression of competition and it's a form of steering that's
25 very much akin to the form of steering that the government

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1 wants to introduce. They are pointing to steering that they
2 think ought to be happening at the merchant level which is
3 just an indirect version of this. This is the card companies
4 steering the customers directly by offering them rewards and
5 value and so forth instead of doing that indirectly through a
6 merchant.

7 So, I find it odd to be pointing to an activity that
8 is kind of essentially a competitive activity of this kind.
9 It is pushing people towards your products, giving them
10 incentives to go to your products and calling it a source of
11 market power. It is, in fact, an expression of competition.

12 THE COURT: If these efforts, steering people to
13 Visa or MasterCard, using rewards for instance is a form of
14 steering that has become successful, is there an economic
15 analysis that might indicate that the non-discrimination
16 provisions would become unhelpful or ineffective at some point
17 because everyone is steering in the same way by steering
18 people to their cards so this non-steering provision would not
19 have any real effect at some point; have you studied that, is
20 there anywhere in your report?

21 THE WITNESS: Yes, and this is exactly the right
22 question to ask and it is what we're going to be coming to.

23 THE COURT: We're coming to that too.

24 MR. CHESLER: Your Honor, we're coming to
25 everything.

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1 THE COURT: During my lifetime I hope.

2 MR. CHESLER: How quickly would you like me to go,
3 Your Honor?

4 THE WITNESS: This falls into the area of
5 competitive effects but the issue is that there are multiple
6 ways to steer customers, there are multiple mechanisms for
7 doing this. The government is concerned with one particular
8 mechanism, they're worried that because one particular
9 mechanism is shut down, that's a problem. There is a reason
10 why that particular mechanism is shut down the way it is and
11 why competition expresses itself through all the other
12 mechanisms that are available for steering customers that
13 don't have the same harmful consequences for competition that
14 are manifest if you allow the kind of steering that the NDPs
15 protect against and that's what I'm going to explain to you
16 when we come to competitive effects, exactly why it's
17 different to have that kind of steering rather than the kind
18 of steering that the networks do with their customers away
19 from the point of sale through rewards and so forth.

20 THE COURT: Well, I guess one of my questions is why
21 if the nature of the competition is changing by virtue of the
22 replication of some of these programs by the networks and so
23 forth, why there would be such great concern on the part of
24 American Express as to whether they maintain or give up the
25 NDP as part of their business model. So, I don't think that

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1 goes really to the antitrust question but it goes to their
2 business model and we're here and a great deal of effort is
3 being taken to resolve this issue in court as to whether
4 there's an antitrust violation but if the market is changing
5 of its own weight due to the replication, what's the
6 difference if they have the NDP or they don't have the NDP
7 going forward?

8 THE WITNESS: Well, going forward Amex is continuing
9 to try to be a competitive presence in the industry by
10 differentiating, by staying ahead of MasterCard and Visa, by
11 offering valuable services to customers and by differentiating
12 itself. If they get to the point where they don't have a
13 business model that can effectively differentiate themselves
14 from MasterCard and Visa, then you have a phenomenon you've
15 heard about I think before in this trial taking over which is
16 that because of the network externalities in this kind of
17 market, dominance will foster dominance. The way that smaller
18 firms succeed here is by working hard to differentiate
19 themselves and by therefore carving out a reason why customers
20 should be using a smaller network.

21 What I hope to explain to you is that the NDPs are
22 playing a valuable role in this industry because they enable
23 Amex to do that. I believe Dr. Gilbert talked about, he
24 explained to you that when you're looking at vertical
25 agreements, vertical restrictions, you have to look at not

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1 only what the restriction restricts but also what it enables
2 and that's really where all of this is headed is that the NDPs
3 are core to Amex pursuing a strategy where it's able to stay
4 ahead of the competitors with a differentiated product that is
5 going to be a significant competitive check in this market.
6 That's what's worked for the last dozen years. And, you know,
7 we -- at least I personally don't want to see that check on
8 the market removed.

9 MR. CHESLER: Thank you, Your Honor.

10 Q Let me just focus on one follow-up to one of the
11 questions from the Court and then we'll move on with
12 insistence.

13 If you look at the direct steering that you were
14 talking about a few moments ago that's taking place between
15 the networks and their own consumers, the competition that's
16 going on for rewards and other benefits, for example, and you
17 compare that to the form of steering that the government says
18 should take place at the merchant level, what, if any,
19 significance is there to the fact that in one situation
20 you're dealing with the point of sale and in the other you're
21 not.

22 A Yes, and this is going to be getting to some of the
23 issues that we're discussing. The point of sale is something
24 that Amex doesn't have any control over. Amex can control its
25 interactions with cardmembers when it's dealing with them

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1 directly but when you're talking about the point of sale, the
2 merchant controls the interaction and the merchant's interest
3 and Amex's interests are not perfectly aligned.

4 So, for Amex to create products that are valuable to
5 the merchants, it has to have certain restrictions in place to
6 assure that the merchants are going to act in accordance with
7 the characteristics that Amex needs to deliver to make its
8 product attractive.

9 It is kind of like McDonald's has a franchise or
10 McDonald's has franchises all over the place, right, and it
11 has contracts that say the franchises have to, you know, live
12 up to certain standards, there's a big book that this is all
13 the stuff that the franchises have to do. Those are
14 restrictions that are put in place because McDonald's
15 interests and the franchise's interests are not necessarily
16 perfectly aligned, so you need a contract that says, you know,
17 you're going to have your tables set up like this and the
18 counter is going to have to look like this and, you know, it
19 spells it out very explicitly.

20 That's really where we're going with this. The
21 difference here is the point of sale is a critical point of
22 contact with the consumer that affects consumers' perceptions
23 of Amex and Amex isn't there to control that at all, the
24 merchant is in charge of that.

25 Q So, let me come back again to insistence and, in

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1 particular, the item I think we were looking at a few moments
2 ago; after the one about direct competition among issuers you
3 have an entry that talks about insistence presentations as
4 marketing tools that put Amex in the best light and don't
5 account for customer loyalty to the merchant.

6 So, let's take those in two separate pieces because
7 there's an "and" in there. Let's take the first part. What
8 is the significance of insistence presentations being used as
9 marketing tools that put Amex in the best light, what does
10 that have to do with your analysis of whether insistence is
11 actually a source of antitrust market power.

12 A So, this is really I'm responding here to some of the
13 evidence that the government and Dr. Katz rely on. In fact,
14 when it comes to insistence, they really emphasize this
15 evidence about the importance of insistence that was developed
16 in the context and used for negotiations with merchants and
17 the point that I'm making here is that evidence that is
18 developed for and used in those contexts is done for the
19 purpose of negotiation and when companies negotiate with each
20 other, their objective is to put their positions in their best
21 possible light.

22 So, I think that -- it's not that that evidence
23 should be ignored but it should be interpreted in light of
24 that fact and weighed against other evidence.

25 Q Now, let's take the other half of the sentence: Do not

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1 account for customer loyalty to the merchant.

2 What is the significance of that?

3 A Because these presentations are for the purpose of
4 negotiations with merchants, they don't acknowledge that there
5 is a merchant position and a merchant counter to Amex's
6 position regardless of how credible Amex's position is about
7 its own position and its own importance and the counter is
8 that the merchant also has loyal customers as well and if Amex
9 walks away from the merchant, it will lose customers too and,
10 moreover, that will be particularly damaging to Amex. Amex is
11 particularly vulnerable to the consequences of not
12 consummating a deal with a merchant and the reason has to do
13 with phenomena that have been discussed at trial the,
14 phenomena of spillover and network externalities, that if a
15 customer is lost to Amex because they are loyal to a merchant,
16 they will also be probably considering using other payment
17 cards, that tends to happen in those situations, and then they
18 use those payment cards generally, then you're in the
19 situation where merchants start to perceive Amex as less
20 relevant, acceptance may go down and so forth and this becomes
21 a self-reinforcing process.

22 So, Amex has great vulnerability in these
23 negotiations. It needs to be accepted. The downside for Amex
24 is severe and, of course, Amex doesn't mention any of this in
25 their negotiating materials and I find it very puzzling that

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1 Dr. Katz's analysis doesn't explore this countervailing
2 force. All he has done is go through one side of the
3 equation. He's talked about the power that Amex might have
4 over the merchant because of insistence without talking about
5 the power that the merchant has over Amex because Amex needs
6 to be accepted.

7 Q Okay. The last item on the list about insistence is:
8 "Available data are inconsistent with the government's claims
9 about insistence."

10 Have you looked at various data and examined them
11 and evaluated the government's claims in the light of the
12 data?

13 A Yes, I have.

14 Q Have you looked, again, at these loyalty databases we've
15 been talking about in that connection?

16 A Yes, I have.

17 Q Let's look at --

18 MR. CHESLER: Your Honor, this one is confidential.

19 Q -- Slide 81. Without mentioning the names of the
20 merchants or the particular numbers, what is 81 intended to
21 show, Professor?

22 A 81 is showing the fraction of the plaintiff merchants'
23 sales as -- sales included in this database that are accounted
24 for by customers who use Amex and only Amex and we're looking
25 at the eight different merchants for whom we have data and you

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1 can see in looking at this slide that that is a very, very
2 tiny fraction in all of these cases.

3 Q And what is the significance of that with respect to
4 insistence as a source of antitrust market power?

5 A Well, you know, insistence is an abstract concept. What
6 we're looking for are practical measures that correspond to
7 that concept and one natural measure that one might use is,
8 well, people who only use Amex at a merchant are people who
9 that merchant might consider to be Amex insistent and what
10 this is showing is that at these merchants the customers who
11 fall into that category who are insistent by that definition
12 are not very important and I should add to that that those
13 customers, by the way, are not necessarily insistent, it is
14 just that they used Amex for all of those transactions, they
15 might be easily nudged to another card and we're going to see
16 some evidence that pertains to that in just a little bit.

17 Q Okay. Let's look at another chart from the loyalty data
18 on the subject of insistence, Slide 82. Again, it's
19 confidential.

20 So, without naming the names of the merchants or the
21 figures that are there, how does this differ from the other
22 chart and what is the significance of it?

23 A This is very similar to the other chart. The only
24 difference is that instead of expressing these Amex only users
25 as a fraction of the -- their spending as a total of the total

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1 amount of spending, what we have here instead is as a fraction
2 of the Amex spending only and what you see here, of course, is
3 that those numbers are larger because it is a smaller base.
4 We're measuring this just relative to the Amex users but these
5 are still quite small numbers.

6 Q Now, have you also looked at switching in the context of
7 your evaluation of insistence as a source of antitrust market
8 power?

9 A I have, yes, and we've looked a little bit about this --
10 pardon me, we have looked a little bit at the switching data
11 already earlier.

12 Q So, let's look at Slide 83 please. And this is also a
13 confidential slide. Is this also from the loyalty databases?

14 A It is, yes.

15 Q And what does this slide show?

16 A This slide is showing the frequency with which Amex --
17 people who use Amex on a given transaction use a different
18 means of payment for the very next transaction at the very
19 same merchant and you can see that there's a separate bar for
20 each of these eight merchants and in all cases I take these
21 percentages to be rather large. We saw data that was akin to
22 this earlier. This is breaking it down by the individual
23 merchants.

24 Q So, this would be a merchant -- a consumer goes into one
25 of these merchants using her American Express Card and the

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1 very next time she goes to the very same merchant she switches
2 to some other card, some other form of payment?

3 A Yes, and that happens with the frequencies that are
4 indicated in that figure.

5 Q Now, did you also look at Visa payment data in connection
6 with the issue of insistence?

7 A Well, there is something called the VPPS, the Visa
8 Payment Panel Study.

9 Q Let's turn to Slide 84 please entitled the Visa Payment
10 Panel Study.

11 So, what is VPPS?

12 A Well, this slide just gives a series of bullet points
13 that describe the study, it's something that is operated by
14 Visa and I think it's for the purpose of providing information
15 to their issuers. They follow a bunch of respondents every
16 month who keep a diary of their purchases for a single month,
17 they keep track of what they spend and they do that I think
18 one month out of every quarter and these data run from 1995
19 all the way to 2011, we were able to get these data through
20 discovery in this case.

21 Q Now, in this context is there a term called "single
22 homing"?

23 A Yes, this is a term that's used to refer to the use of
24 payments methods. Single homing means a -- it's a way of
25 saying a strong preference for a particular -- let me rephrase

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1 that, a tendency -- better way to do this; there are two types
2 of single homing, there's something called single homing in
3 ownership, which means that's the only card that you have, and
4 then there's another concept that is called single homing in
5 use, and that means that that's the card you predominantly
6 use. And these are also two measures that are commonly looked
7 at, I know some economic scholars have looked at these things
8 and they are sometimes used as measures of insistence.

9 Q On the theory that if you only own one card, you're only
10 going to use one card, so to speak?

11 A That's correct, although, you know, remember, for
12 example, single homing in ownership within GPCC, say that you
13 single home on Amex within GPCC, the question you want to ask
14 yourself is why are you doing that. It may be for some people
15 the reason that they're doing that, even though they know that
16 Amex isn't accepted at a lot of merchants, is that they're
17 perfectly willing to use their debit card. So, even when
18 you see people single homing, you don't necessarily conclude
19 from that that they don't have any substitutes.

20 THE COURT: So, single homing doesn't include debit
21 cards?

22 THE WITNESS: Two ways to define it and I've looked
23 at it both ways; there's single homing in GPCC and then we can
24 talk about single homing in GPCC and debit.

25 THE COURT: After this trial I'm going to cash, I'm

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1 going to go around like my grandfather did.

2 MR. CHESLER: I don't think we were separated at
3 birth, Your Honor. My grandfather did the same thing.

4 THE COURT: It worked for him.

5 MR. CHESLER: Yes, it did.

6 Q So, you've looked at this single homing on ownership data
7 from the loyalty databases, have you?

8 A I have, yes.

9 Q In connection with insistence. So, let's look at Slide
10 85. This is a confidential slide.

11 What does, without mentioning the numbers, what does
12 85 show?

13 A 85 shows based on this Visa data a time series running
14 from 1995 all the way to 2011, the frequencies of single
15 homing in ownership on Amex, and then the green line is within
16 GPCC, which means Amex is your only GPCC card, and the yellow
17 line is single homing within GPCC and debit which means you
18 have an Amex card, no other GPCC card and no debit card.

19 Q And what's the significance of the lines, the green and
20 yellow lines on Slide 85?

21 A Okay. So, one question when you look at evidence of
22 single homing is is a particular number high or low, is five
23 percent a big number or a small number. Well, one way to
24 evaluate that is to use a competitive benchmark and that's one
25 of the reasons that I began by talking about Amex in the 1990s

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1 not having market power I think by any plausible assessment.

2 So, these time series allow us to compare these
3 measures of insistence, single homing, and to see how they
4 varied over time and you can see that for single homing in
5 GPCC, which is the green line, you only -- you carry an Amex
6 and no other GPCC card, that's been pretty flat since the
7 1990s, and if you look at single homing in GPCC and debit, the
8 yellow line, that's actually been decreasing and kind of
9 converging to the axis here, there are relatively few people
10 who do that.

11 Q Now, do you also look at single homing in use; in the
12 same context that you've looked at ownership, did you look at
13 use?

14 A I did.

15 Q So, let's turn to Slide 86.

16 What does Slide 86 show, again without naming the
17 numbers?

18 A It's the same analysis for single homing in use rather
19 than ownership. Of course, the frequencies are higher here
20 because if you single home in ownership, you necessarily
21 single home in use but not the other way around, but the same
22 patterns emerge. The single homing in use for GPCC cards is
23 pretty flat, the single homing in use for debit cards is
24 declining.

25 Q Did you also compare single homing on Amex to single

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1 homing in ownership to Discover?

2 A Yes, I did.

3 Q Why?

4 A Well, again, the approach here is to pick competitive
5 benchmarks. It's hard to know what number here, what level of
6 insistence this measure of insistence would indicate market
7 power. So, the idea is to compare it to a competitive
8 benchmark and, once again, I hold out Discover as a company
9 where I think there is agreement that Discover does not have
10 market power. The question then is how does this single
11 homing compare between Amex and Discover.

12 Q And on Slide 87 there's a reference to that; what is the
13 bottom line with respect to that comparison?

14 A The bottom line is it's comparable between the two, that
15 the single homing in GPCC and debit is similar for Discover
16 and Amex and the same is true for single homing in GPCC. This
17 is single homing in ownership is being referred to in this
18 slide.

19 Q Now, do these results with Amex and Discover being
20 compared, do they take into account current market share?

21 A No, no, insistence is something that is measured
22 independent of market share, single homing. All measures of
23 insistence are measured independent of market share and
24 Dr. Katz has argued that insistence is the source of market
25 power and so consequently it's appropriate in addressing that

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1 to measure it that way but I mean market share is also
2 important.

3 Q So, did you look at insistence data that incorporates
4 share?

5 A Yes, I did.

6 Q So, then let's look at Slide 88. And this is also
7 confidential data so please don't mention the numbers, but
8 what does Slide 88 show?

9 A This is showing the -- it is showing Amex cardmembers
10 that single home in ownership on GPCC and debit as a fraction
11 of all consumers and it is showing that the fraction here is
12 really de minimis, this is very tiny.

13 Q And what's been the trend over time?

14 A It's been declining.

15 Q Small and declining?

16 A Small and smaller.

17 Q Have you looked at what happens if you take debit out of
18 the equation and look at single homing on GPCC only and
19 measure that share over time?

20 A Yes, that is --

21 Q Slide 89?

22 A -- reflected in the next slide, yes.

23 Q And again without mentioning the numbers, what does that
24 show?

25 A That shows numbers that are quite low. These increase

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1 somewhat but the levels even after they increase are quite
2 small.

3 Q So, what significance does that have in your evaluation
4 of whether insistence is, in fact, a source of antitrust
5 market power for American Express?

6 A Well, Dr. Katz and I agree that share is an important
7 consideration because it determines relevance, relevance to
8 the merchant, and so you have to ask how relevant is this
9 phenomena to the merchant. We are talking for these kind of
10 measures of insistence about a very, very small slice of
11 consumers.

12 Q Did you also compare American Express single homing to
13 Visa and MasterCard single homing?

14 A I did, yes.

15 Q And what did you find there?

16 Let's look at Slide 90, again confidential data so
17 stay away from the numbers. What did you find?

18 A Slide 90 is showing single homing in use within GPCC
19 and debit, so this is within that category, you're primarily
20 using one particular means of payment and it is showing this
21 over time separately for the four major networks and several
22 patterns are clear here. One is that they're all declining
23 and that pattern is due in part to the growing use of debit.

24 Q What pattern is due in part to the growing use of debit?

25 A That all of these lines are generally declining. The

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1 Amex line, it is hard to see that it's declining because it's
2 closer to zero but all of these lines are generally declining.

3 But the other thing that you see is that single
4 homing in use is much higher for Visa and MasterCard than for
5 American Express or Discover. Historically that's always been
6 the case. The gap has fallen to some degree but it's still
7 very large.

8 And the final thing that you note from this figure
9 is that Amex is generally at the bottom. Visa, the insistence
10 has -- I'm sorry, not Visa, Discover's insistence level as
11 measured by this measure of single homing has declined to the
12 point where it's close to Amex's, but Amex certainly is at the
13 lower end of these four companies.

14 Q So, focusing then just on the Amex users who are
15 represented, for example, by that orange line, small as the
16 percentage may be, did you look at the question of whether
17 within that universe of Amex users it is in fact a static or
18 changing universe of individuals?

19 A Yes, I looked at that question.

20 Q And in that context is there a phenomenon known as
21 churn?

22 A Yes, it is a phenomenon that is commonly described as
23 churn. The term "churn" is used in a lot of industries and it
24 simply refers to the fact that customers may be lost to
25 competitors.

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1 Q And did you make an effort to measure the churn here with
2 respect to the Amex universe of users we're talking about at
3 the moment?

4 A I did, yes.

5 Q What sort of data did you use for that?

6 A These data are all the VPPS data.

7 Q That's Visa data?

8 A Payment, yes, the Visa survey that we've been talking
9 about.

10 Q Okay. Let's turn to Slide 91 which is a confidential
11 slide from Visa's own data. So, without mentioning the
12 numbers, would you describe for the Court what Slide 91 shows?

13 A So, for slide 91 I've used a measure of churn that I've
14 taken from a published academic study by a well known scholar
15 who works in this area. The measure that he used of churn was
16 the following, he associated a particular customer with a
17 particular card if that card (sic) put at least 60 percent of
18 their spending on that card at a particular period of time.
19 So, I've used spending over the course of a quarter, if a
20 customer is putting -- concentrating at least 60 percent of
21 their spending on Amex, then they are, according to this
22 definition, affiliated with Amex.

23 Now, the question is, out of those customers, how
24 many are still affiliated with Amex in the next quarter.

25 (Continued on next page.)

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1 DIRECT EXAMINATION (continued)

2 BY MR. CHESLER:

3 Q And by that you mean how many are still spending at least
4 60 percent of their volume of GPCC and debit on Amex in the
5 next quarter?

6 A That's correct.

7 Q And what do the data show, without reciting the specific
8 numbers?

9 A So the data show that Amex actually has, when compared to
10 Visa credit, MasterCard credit, Discover credit and signature
11 PIN debit, Amex actually has the highest churn, and the churn
12 rates are, you know, by the standards that I've seen in other
13 industries, these churn rates are pretty high. This is an
14 indication that loyal customers are being won by competitors
15 with fair regularity.

16 Q So let's go to the bottom line with respect to insistence
17 as a source of antitrust market power.

18 Would you agree that Amex has some loyal
19 cardmembers?

20 A Absolutely. In going through this analysis, I don't mean
21 to suggest at all that there is no loyalty to Amex, that Amex
22 isn't investing and creating some difference.

23 My point is simply that when one looks at the
24 objective measures, the government's case has exaggerated the
25 role of insistence and the actual levels are not sufficiently

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1 high to sustain significant market power.

2 Q How would you rate the durability of this loyalty to
3 American Express?

4 A Well, as we've seen from the churn data, it's not very
5 durable. Customers can be stolen away from Amex, and any
6 loyalty has to be re-earned constantly by delivering value to
7 customers, and that's the way competition is supposed to work.

8 Q And when you looked at these various measures of
9 insistence in the current time frame as compared to the '90s
10 when you said that American Express by any measure did not
11 have market power, what did that comparison show?

12 A I think it shows that there hasn't really been any
13 change, that there hasn't been any indication that Amex has
14 created a new world in which it has greater insistence and is
15 capable through that channel of generating greater market
16 power.

17 Q And when you compared the data about Amex insistence to
18 Discover, what did that show?

19 A Again it showed something similar, that compared to
20 Discover, Amex does not seem to have an edge, according to
21 these metrics. So if looking at these kinds of metrics leads
22 to the conclusion that Amex has market power, then one would
23 have to conclude that Discover has market power as well, which
24 to me doesn't make a lot of sense for this industry.

25 Q So let's turn to one other subject related to market

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1 power, and that is corporate card insistence.

2 A Yes.

3 Q You're aware that the government and Dr. Katz have said
4 that or claimed that American Express derives antitrust market
5 power over merchants from its corporate card business?

6 A Yes, indeed.

7 Q Do you agree with that claim?

8 A No, I don't.

9 Q I'm trying to pass over slides which are pointing to
10 particular pieces of evidence in the record. So I'm not going
11 to dwell on it, but is 92 some testimony from Amex's
12 president, Mr. Gilligan, about the competitive nature of the
13 corporate card business?

14 A Yes, that's what that is, yes.

15 Q Have you looked at data, as you've done with respect to
16 these other variables, have you actually analyzed data
17 concerning the question of corporate card insistence?

18 A Well, I think that the data that I have analyzed has to
19 do with corporate card competition. We have the same two
20 issues arising with corporate cards as we have with individual
21 insistence. The issues are, first of all, Amex competes
22 vigorously with other networks in order to win these corporate
23 accounts and that is simply a way of steering customers
24 directly, Amex is steering them directly within a context
25 where Amex is dealing directly with the customer. So again,

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1 to point to this very intense competition as the source of
2 market power is a little odd, and the data analysis that I did
3 was related to -- to exhibiting some of that competition.

4 Q Okay. So we've heard some testimony about the fact that
5 at some point American Express purchased the GE corporate card
6 portfolio.

7 You're familiar with that testimony?

8 A Yes, indeed.

9 Q Did you examine data relating to what happened to that
10 portfolio thereafter?

11 A I did.

12 Q What was your reason for looking at those data?

13 A Well, this is an instance where Amex was trying to
14 acquire a block of business, and if Amex has market power, it
15 shouldn't have any difficulty hanging on to business that it
16 acquires in that way. I've seen, you know, I've seen
17 testimony at trial that indicates that there's reason to think
18 that Amex actually has some disadvantages in competing for
19 these corporate clients because corporate clients perceive a
20 coverage gap, an acceptance gap, and also because Amex doesn't
21 have the treasury relationships with the banks. So this was a
22 good context in which to test and see whether Amex's
23 disadvantages are really competitively significant, what
24 happened to this block of GE business.

25 Q So let's look at slide 93. This is also confidential

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1 data, so just stay away from the numbers.

2 What does the slide depict?

3 A The slide is simply dividing up the accounts and then
4 dividing up the charge volume according to whether Amex
5 retained it or lost it, and there's a third category here
6 which is GE. The reason that GE is broken out separately is
7 because, according to the contract, GE had to stay with --
8 with Amex as part of the acquisition.

9 So in look -- that's not very important when you
10 look at the number of accounts 'cause it's only one account,
11 but when you look at charge volume, the right comparison to
12 make is other than GE, what happened to these accounts, and
13 you can see how it splits out. I'm not -- I can't say the
14 numbers out loud, but an awful lot of this was lost.

15 Q Now, have you seen evidence that Visa and MasterCard
16 target this coverage gap issue in the context of competing for
17 corporate cards?

18 A Yes, absolutely. This is -- this is one of their selling
19 points.

20 Q So let's look at slide 94.

21 What is 94?

22 MR. CHESLER: This one is not confidential, Your
23 Honor.

24 A I'm sorry.

25 94 is an example of such an advertisement and it's

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1 basically playing on the idea that because of the coverage
2 gap, if you take your client to dinner and expect to pay with
3 an Amex, you may be -- your client -- you may be in the end
4 asking your client to pick up the tab. So they're very aware
5 of this and they use this effectively as an advertising tool.

6 MR. CHESLER: I'm afraid we're going one other slide
7 in this section which is confidential. I apologize.

8 THE COURT: Go ahead.

9 MR. CHESLER: I apologize, Your Honor.

10 THE COURT: That's fine.

11 MR. CHESLER: The choreography of this is a little
12 intense.

13 THE COURT: That's all right.

14 BY MR. CHESLER:

15 Q Have you looked at the level of American Express payments
16 to corporate cards over time?

17 A Yes, I have.

18 Q What is the relevance of that data, those data for this
19 purpose?

20 A Again it's an indication of how vigorously Amex has to
21 compete to win and retain these accounts, and the pattern that
22 becomes very clear in the data is that Amex has, over time,
23 had to make increasing concessions to its corporate accounts
24 in order to -- in order to sign them and retain them.

25 Q So let's look at slide 95, which is confidential.

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1 So without mentioning the numbers, what does slide
2 95 show?

3 A Slide 95 is showing two things, both related to the
4 incentive payments that Amex makes to its commercial clients.
5 It's showing the dollar amounts, those are the bars, and the
6 scale is on the left-hand side. I won't say the numbers. It
7 also shows the same payments as a percentage of the billed
8 business, the scale for that is on the right-hand side and
9 that's the red line. And you can see that both of these are
10 going up substantially over time.

11 Q Does the fact that the red line going up, does that
12 indicate that the payments are growing faster than Amex's
13 charge volume is growing?

14 A Yes, it does. If they were growing at the same rate, it
15 would be flat.

16 Q Are you familiar with the notion of mandation in the
17 context of corporate card agreements?

18 A I am, yes.

19 Q What does mandation refer to?

20 A It actually refers to a lot of different things. It's --
21 it's a term that is used in a vague way to summarize a
22 collection of policies that corporations adopt to try to make
23 sure that people charge -- put -- when they're doing, making
24 purchases, business purchases associated with the company,
25 their employer, that they put their charges on the company's

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1 corporate card, but these policies take many different forms
2 ranging from a stated preference on the part of the company to
3 use the card, to policies that have forms like you must use
4 the card if it's accepted, but if it's not accepted you can
5 use any other means of payment and get reimbursement, which is
6 not really putting employees in a position where, you know,
7 they are having their choice of merchants dictated for them
8 because they can't pay at those merchants. They can, they
9 just have to get reimbursed.

10 And then at the extreme, there are some policies
11 that at least nominally say you have to put all expenses on
12 this card. Though my understanding anecdotally is that in
13 most of those cases when people have to do something else,
14 they make exceptions, it's just not as easy for them. So I'm
15 giving this description just to make it clear that when the
16 term "mandation" is used it doesn't literally mean that all
17 the corporation's employees have to use the card for
18 everything. It's weaker than that. That's not to say that it
19 doesn't impose some restrictions and have some effect, but it
20 isn't a -- it is rarely a draconian policy.

21 Q So does American Express, in fact, have antitrust market
22 power based upon its presence and position in the business of
23 obtaining corporate card relationships?

24 A No, it doesn't. I don't think a case can be made that it
25 does.

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1 Q And does it have antitrust market power based upon any
2 combination of or all of the other elements we've been through
3 which the government has pointed to during the course of the
4 trial?

5 A Not that I've seen, not based on my own analysis. And
6 I've gone through the government's analysis very carefully,
7 Dr. Katz's analysis, and I believe that they have not proven
8 their claims regarding market power.

9 Q I want to turn then to the third major topic you were
10 going to address, which is competitive effects.

11 Now, it seems like a long time ago because it was a
12 long time ago that we looked at your first summary of
13 conclusions document which we've reproduced behind Tab 96 so
14 we don't have to flip back and forth, and the third of your
15 conclusions says: "NDPs promote vigorous competition in the
16 payment card industry."

17 Is that, in fact, your conclusion with respect to
18 competitive effects?

19 A It is, and we had a preliminary discussion about that,
20 which I think now we're going to elaborate on.

21 Q Okay. In your view, what would the effect upon
22 competition be were the Amex NDPs eliminated?

23 A My view is that competition in the industry would be
24 hurt, that Amex has played a very special role in this
25 industry and has been able to play that role by virtue of its

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1 particular business strategy that involves the differentiated
2 kinds of products that it's -- that it's been providing to the
3 market, that furthermore, the NDPs have enabled that, and that
4 without the NDPs we would see that form of competition
5 essentially dry up. I believe that the market would then
6 revert to a situation where there would be less
7 differentiation and we would see dominance begetting
8 dominance.

9 Q Why is it so important for Amex to have a differentiated
10 strategy? Why wouldn't it be perfectly okay to just be a kind
11 of me-too product for whatever portion of the market prefers
12 to use Amex cards?

13 A Well, it just is not a very effective strategy in
14 industries generally with significant network externalities.
15 Smaller competitors have to have ways to differentiate
16 themselves, and in particular in this industry I think that,
17 you know, there's evidence for that.

18 Discover has not differentiated itself as
19 effectively because it has a lendcentric model and, as a
20 result of that, has not been nearly as important in being a
21 check on Visa and MasterCard. We've heard some about
22 differentiation, ways that Discover differentiates itself, and
23 I think that's how Discover has managed to survive at all, but
24 this differentiation is critical.

25 Q We've had a number of instances during the trial where

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1 Discover has kind of been held up as an example, in fact even
2 by the president of Discover who testified essentially that he
3 thought American Express should do some of its business in
4 different ways.

5 Looking at the industry, is Discover the model that
6 American Express, in your view, should be following in order
7 to successfully differentiate itself as compared to the larger
8 networks?

9 A Well, I would answer that question by just looking at
10 outcomes. American Express has been the main competitive
11 check on MasterCard and Visa. So in terms of the end that I
12 as an economist think we want to achieve through public
13 policy, the Amex business model has been much more important.
14 It has succeeded in applying much more competition to this
15 market.

16 Q One other point, then I want to go to your next chart.

17 We've heard two different terms and I want to be
18 sure we've got a clear record on it. We've heard about
19 network effects and you have several times referred to network
20 externalities.

21 Do those two terms differ? Are they the same? Are
22 you using them as synonyms? Please just explain.

23 A I'm using them synonymously and I didn't intend to
24 introduce confusion. Just think of them the same way.

25 Q This has been described in the record, but it's worth, I

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1 think, 30 seconds. Just describe for the Court what is the
2 nature of the network effects in this particular two-sided
3 market that you've been talking about for transaction
4 payments?

5 A Sure. Companies accept payment methods because consumers
6 use them. They're more likely to accept them if more
7 consumers use them. Consumers use payment methods if
8 merchants accept them and are more likely to use them if more
9 merchants accept them. So this creates this feedback between
10 the two sides of the market where, you know, these effects
11 bounce back and forth. That's -- that's a reflection of
12 spillover and network effects.

13 Q Let's turn to slide 97, please.

14 So are these your basic conclusions with respect to
15 competitive effects, Professor?

16 A Yes, they are.

17 Q So the first one says that: "NDPs are vertical
18 agreements used by a variety of firms for procompetitive
19 reasons."

20 Why do you start there? Why is it necessary to
21 start with the label "vertical agreements" and the fact or the
22 statement that they are used by many firms for procompetitive
23 reasons?

24 A Well, antitrust economics distinguishes, makes a very
25 important distinction between vertical agreements and

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1 horizontal agreements. Horizontal agreements are agreements
2 between competitors and those are generally problematic. And
3 then there are vertical agreements. Vertical agreements are
4 agreements between parties that are up or downstream from each
5 other and those generally are not considered anticompetitive.
6 In fact, those kinds of agreements need to exist. I need to
7 have a partner to help me deliver, downstream partner to help
8 me deliver my goods to the ultimate consumers.

9 So vertical agreements are used all the time,
10 they're extraordinarily common, and when they're used, they're
11 normally used for procompetitive reasons because their purpose
12 is to get the vertically-related partners on the same page, to
13 make sure that they're working for the same end and to make
14 sure that they're working to produce an offering to the
15 ultimate consumers that's as attractive and valuable to the
16 ultimate consumers as possible, and therefore there's a
17 general recognition among antitrust economists that vertical
18 agreements by and large are very good things, and therefore we
19 are careful in singling out cases where we're going to
20 consider them as problematic. Though there are such
21 situations, to be sure.

22 Q Now, we'll come back to that, of course.

23 You mentioned earlier, I believe, in answering one
24 of the Court's questions that it's important to look not only
25 at what a vertical restraint restrains, but also what it

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1 enables.

2 Do you recall saying that?

3 A Yes, I do. I believe Professor Gilbert said that as
4 well, and it's an important principle. It's -- you have to
5 look at what it restrains. You have to look at what the --
6 whether the restraint is directly consequential in light of
7 all the other mechanisms that are available to companies to
8 induce customers to patronize them rather than their
9 competitors, and then you have to consider what is enabled by
10 the restraint and evaluate the potential benefits of that.

11 Q Now, do other companies use non-discrimination provisions
12 that also restrain some competition but enable other forms?

13 A Other companies, sure, it happens all the time.

14 Q Well, let's look at slide 98, and in particular one of
15 the companies -- are these companies that, from your view of
16 the evidence, all use some form of non-discrimination
17 provisions?

18 A Either non-discrimination provisions or provisions that
19 are very similar to non-discrimination provisions.

20 MR. CHESLER: So this obviously, Your Honor, is a
21 non-confidential chart.

22 (The above-referred to exhibit was published.)

23 MR. CHESLER: It's up, thank you. I should have
24 known.

25 Q One of the companies there is Expedia.

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1 Describe from your view of the facts how does
2 Expedia use non-discrimination provisions, again, in this
3 context of looking at what they restrain and what they enable.

4 A Sure. So Expedia has -- Expedia gets travelers to use
5 its service to make reservations with hotels and airlines and
6 rental car companies. It has contracts with those parties,
7 contracts with rental car companies, for example, that say if
8 somebody books through Expedia, you can't change their booking
9 and not pay us. So, you know, you can imagine the customer
10 showing up at the point of sale and the rental car company
11 saying oh, I see you've booked this, but you know what, we can
12 actually give you a different car that you might prefer and
13 why don't you take this booking instead, and since it's a
14 different booking, the rental car company wouldn't have to pay
15 Expedia. Expedia has a contract that forbids that, and the
16 reason for that is obvious. If it didn't forbid that, Expedia
17 would have no incentive to make all of the investments that
18 get the customers to use its Web site and make the bookings
19 with the rental car companies and the hotels and the airlines.
20 So that provision is important to make sure that the -- that
21 the market works well, that they can actually deliver a
22 service of value.

23 Q Is that another example of where the participants at
24 the -- in the vertical arrangement with one another don't
25 necessarily have interests that are perfectly aligned?

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1 A Sure, and I can give you another familiar one, if you
2 want, that I think directly speaks to this issue of enabling
3 competition.

4 Think about the example of using a real estate
5 broker to sell your house. The real estate broker, you may
6 ask a real estate broker to list your house, to sell your
7 house. They make all sorts of investments: they send out
8 fliers, they may help to show the house, they will bring
9 buyers in and so forth, they put a lot of effort into this.
10 And now imagine if after they find a buyer who is prepared to
11 buy the house another broker shows up and says you know that
12 first broker is charging you five percent. I'm willing to
13 execute the sale for four percent. Well, the homeowner would
14 have an incentive at that point to say well, I'm going to take
15 this new broker, that's cheaper.

16 Okay. So they write a contract with the original,
17 and if they did that, then of course the first broker wouldn't
18 have any incentive to expend any effort in selling the house
19 to begin with and that's why the contract with the first
20 broker is going to say that the first broker has the right to
21 exclusively represent the homeowner for some period of time.

22 Now, I guess you could say that this contract
23 eliminates competition in brokerage fees at the point of sale
24 because at the point of sale you've got a buyer, he wants to
25 buy the house. You could have another broker come in and say

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1 I'll give you four percent and the first one has to say all
2 right, I'll match that or drop lower, but I think we can
3 understand in that context that that would be very destructive
4 to this market.

5 THE COURT: But if that broker is a free-standing
6 entity or even part of a network and doesn't even claim to
7 control a large part of the market, isn't that a difference?

8 THE WITNESS: It -- there's a world of difference
9 between these examples. I'm only giving this example to
10 illustrate that in a context where the broker plainly has no
11 market power, he is entering into a contract with the
12 homeowner voluntarily, a contract that is going to restrict
13 competition at the point of sale.

14 THE COURT: No, but what it does is it protects the
15 broker from the losses that the broker would end up having by
16 virtue of all the work that was put in and the fact that the
17 home seller is now walking away from that and leaving the
18 broker without fair compensation. I sort of think that talk
19 about macro and micro, that's a micro situation and in a sense
20 what we're talking about is an industry-wide issue.

21 I mean, I understand your point, but having dealt in
22 the world of brokers and buyers and sellers in real estate, I
23 don't see it as -- I see it that the contract is a way of
24 protecting someone who has already provided you with value and
25 a service in a one-on-one situation. So maybe there are

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1 parallels, but I don't see it as being quite the same.

2 THE WITNESS: Your Honor, I accept everything you
3 say. In fact, portions of what you say are, in some sense,
4 exactly my point. I will explain what the relevant parts of
5 the parallels are when I start to tell you what the NDPs are
6 doing. There are some things that are quite close.

7 At this point, all I'm making is the general point
8 that's a contract that eliminates a particular expression of
9 competition, which you immediately recognize as being a
10 beneficial thing.

11 THE COURT: Right, of course.

12 THE WITNESS: Yes, that's right. So eliminating a
13 particular expression of competition can't be taken on its
14 face as being a bad thing or anticompetitive.

15 THE COURT: But I don't know that the antitrust laws
16 were created to eliminate those kinds of protections.

17 THE WITNESS: Right.

18 THE COURT: Frankly.

19 THE WITNESS: Right.

20 THE COURT: Right?

21 THE WITNESS: I agree.

22 THE COURT: But we're operating in a larger arena
23 here where the power to control the market is one of the big
24 issues, and, you know, the little broker on Main Street over
25 in Omaha is not really going to affect that market.

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1 THE WITNESS: One of the things we're going to talk
2 about in just a minute is that Amex started to use these NDPs
3 in 1959 when it was the little guy on the corner store and it
4 was using them at that point in time because in this market
5 there was a legitimate procompetitive reason for doing them
6 that is still present and that's what I'm going to be
7 exploring.

8 THE COURT: All right.

9 MR. CHESLER: Let's go to that since that was the
10 next point we were going to in any event.

11 BY MR. CHESLER:

12 Q I think we've heard testimony that American Express
13 offered its first card, which was actually, I think Mr.
14 Chenault said, a piece of paper, in 1958.

15 Are you familiar with that testimony?

16 A Yes, I am.

17 Q I take it you don't believe there's any dispute that in
18 1959, American Express had no antitrust market power with
19 respect to the card business, is that fair?

20 A I don't believe that that is under any reasonable
21 dispute.

22 Q So let's look at slide 99.

23 What is slide 99?

24 A 99 is from the Amex store agreement used in 1959. I
25 think it's the standard agreement and it has the provision

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1 called out there that is the original NDP, and essentially
2 what this provision does is prohibit differences in the prices
3 charged at the point of sale, which is precisely the main, the
4 core of the NDP that the government has objected to in this
5 case.

6 Q So coming back to the Court's point about the broker on
7 Main Street in Omaha versus a large corporation that's doing
8 business on a nationwide basis.

9 What, if any, significance is there to your pointing
10 out that way back in 1959 American Express had an NDP that
11 went specifically to the question of charging different prices
12 for competing cards?

13 A The -- it's clear that the reason for doing it at that
14 time doesn't have anything to do with market power. It's also
15 clear, I think, that the reasons for continuing -- well, there
16 are reasons, I know we have to deal with these anticompetitive
17 allegations, but there are reasons for continuing to have NDPs
18 even today that have nothing to do with market power because,
19 as we saw in the previous slide, there are a number of
20 companies, like Discover, Bill Me Later, Expedia, Buck ID
21 which is a payment card for Ohio State University, I think,
22 where in these cases there is no, I think, reasonable basis
23 for suggesting that any of these companies have market power
24 and yet they have NDPs.

25 This is a way of pointing out that the NDPs are

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1 serving some purpose that is valued by companies that do not
2 have market power, and generally the presumption among
3 economists is that when firms in a competitive setting, firms
4 without market power do something, the presumption is that's
5 procompetitive. In some sense it's the essence of
6 competition. We take what they're doing in those situations
7 as something that is, you know, admirable, that we want to
8 achieve.

9 So it could be that Amex is also now using NDPs for
10 other reasons and principles and we need to explore that. I
11 am simply making the point that the position that these things
12 do not have procompetitive benefits is not a sustainable
13 position.

14 Q Just staying with this point for one other point.

15 Is there anything in the government's case that
16 you're aware of that distinguishes the NDPs of today from the
17 NDPs that Amex had in the 1950s or the NDPs of these other
18 smaller firms that you just mentioned?

19 A Well, there are certainly differences in details, but I
20 would say that, you know, the core provisions, I pointed to
21 the core provision concerning price, price differentials, that
22 those core provisions are present in these other instances as
23 well.

24 Q Okay. So we're talking about whether contract provisions
25 which have been in place since the company was essentially

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1 started in this business somehow have caused anticompetitive
2 effects in the current day, whatever reason they were
3 originally implemented, is that fair?

4 A Correct, that's the issue.

5 Q Okay. So if we look at slide 101, which is just a
6 continuation of the slide that we started out with, just
7 highlighting the next bullet for competitive effects, you say
8 in the second bullet: "NDPs must be evaluated in light of
9 existing overall competitive conditions."

10 You have a subpoint: "Competition for consumer
11 spend is intense and dynamic."

12 Now, what do you mean by "overall competitive
13 conditions" in that entry?

14 A Here I'm referring to the competitive conditions that
15 determine the overall outcome in the market. You know, we
16 talked earlier about how competition will determine the
17 two-sided price, what I'm calling the economic price for
18 payment services. What we need to do is evaluate these in
19 light of how they affect how competition plays out overall and
20 not focus exclusively on how it might play out through a
21 particular channel.

22 Q So let's talk about the other channels of competition
23 that exist today with respect to payment services in this
24 two-sided market.

25 What other channels are you talking about in that

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1 context?

2 A Well, again, the -- the issue here is that Amex competes
3 by using mechanisms that attract customers to using its
4 payment product. You can use the word "steering" for that, if
5 you like, but there's a bunch of mechanisms that it employs in
6 order to direct customers, to incentivize customers to use its
7 products. We've already talked about several of them. So
8 there's a bunch associated with -- there are ones associated
9 with issuing, providing consumers with rewards directly,
10 that's incentivizing them, steering them directly to use the
11 Amex payment products. Also just making better, more
12 attractive products in other ways, making the product --
13 making the payment products feel like they -- you know, making
14 them associated with a greater sense of purchasing security
15 and so forth. So that's one channel.

16 Another channel that we've talked about already is
17 using a mechanism that runs through corporate accounts. This
18 also is a form of steering, if you will, a mechanism for
19 steering. Company, Amex bids against Visa and MasterCard and
20 Discover to win corporate accounts in order to push some of
21 the business to Amex -- Amex products. Competition for GNS
22 partners is another dimension which affects issuance and,
23 hence, a number of people carrying cards and consequently the
24 number of people using the product.

25 There is competition for co-brand partnerships, that

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1 is, as we know, another way to potentially -- to potentially
2 move charge volume to a network. There's competition for
3 merchant acceptance, which is another thing that we've talked
4 about.

5 So there are many dimensions, many mechanisms
6 through which a company like Amex can incentivize customers to
7 use its payment products, if you will, to steer the customers
8 towards its products. The government has been focused in this
9 case on one and only one particular mechanism.

10 Q Point of sale?

11 A Point of sale, yes.

12 Q In some sense, do the NDPs impact or restrain any
13 competition at the point of sale?

14 A I'm sorry, impact or restrain?

15 Q Restrain competition at the point of sale?

16 A Well, we -- the effect that the government is focused on
17 is that the NDPs prevent differential pricing at the point of
18 sale which could be used to steer customers.

19 Q Okay. So is the fact that the overall competition that
20 you've just referred to is intense, in your view, does that
21 mean that the NDPs are necessarily procompetitive?

22 A No, not necessarily, but I think it gives us a reason for
23 caution here. What we're seeing is Amex operate in a way that
24 has contributed a great deal of competitive pressure to this
25 industry, and what we're interested in, at least what I'm

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1 interested in as an economist, is the overall level of
2 competition, the total expression of competition through these
3 multiple channels of, if you will, steering, how intense is
4 that competition overall. That's what -- that's what I think
5 is the important question.

6 So given that we see a high degree of competition in
7 this industry, I think, you know, we have to be cautious about
8 inferring that the NDPs have reduced the overall level of
9 competition in a way that has been harmful.

10 Q Okay. So the next bullet on your competitive effects
11 slide says: "NDPs enable and intensify competition for
12 consumer spend to the benefit of consumers and merchants."

13 Now, way back earlier today, you recall the Court
14 asked a question about whether the NDPs prevent, I think what
15 the Court said, was an equilibrium effect in the market which
16 could work for the benefit of merchants and consumers.

17 Do you recall that question?

18 A I do, yes.

19 Q Okay. So I want, with that question in mind, I want to
20 focus on your topic here of what the NDPs enable and your
21 opinion that they intensify competition for consumer spend to
22 the benefit of consumers and merchants, okay?

23 A Yes.

24 Q So let's look at slide 103.

25 What is this slide intended to show?

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1 A This slide is providing an outline for discussing this
2 issue and talking about the ways that NDPs enable and
3 intensify competition for consumer spend and how that benefits
4 both consumers and merchants.

5 Q You say: The key question are NDPs necessary for Amex to
6 be able to pursue that differentiated strategy.

7 Are they?

8 A In my opinion, the NDPs are necessary for Amex to pursue
9 the differentiated strategy that has for the past dozen years
10 or so applied an enormous amount of competitive pressure to
11 this market.

12 Q I want to ask you about the bases that you have for that
13 conclusion, that spurring competition and innovation through
14 the differentiated product strategy.

15 So let's look at slide 104.

16 What is slide 104?

17 MR. CHESLER: Which is not a confidential slide,
18 Your Honor, it's public.

19 Q And what is its significance with respect to your
20 answering that question that we've just put?

21 A Well, this is -- this is -- this slide is referring to
22 Amex's competitive impact in the market, and I think it's
23 illustrating a point that we have already made about that
24 competitive impact, which is that Amex has forced the other
25 competitors in this market to mimic its innovation and mimic

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1 strategies. So this is a reference to Chase, quote, copying
2 our playbook. So it's an indication of competitive success
3 when -- when others are attempting to do precisely the same
4 thing, or at least something very similar.

5 Q Did you also look at Mr. Chenault's testimony about his
6 role in the government exclusionary rules case and what he was
7 put forward to explain in that case?

8 A Yes, I did, I reviewed his testimony.

9 Q Let's look at slide 105, which just is an excerpt where
10 he's talking about his conversation with the then-assistant
11 attorney general.

12 What, if any, significance, apart from the fact that
13 he testified in the case and said what he said, what
14 significance to you is there from American Express being
15 featured for this differentiated product model in the context
16 of the exclusionary rules case?

17 A Well, I think it just reflects a recognition of the
18 critical role that Amex could play at that time looking
19 forward, the DOJ's recognition that Amex's differentiated
20 product strategy was the key to unlocking competition in this
21 market, and that is, indeed, how it played out.

22 Q Has Professor Katz himself recognized American Express's
23 importance as a competitive check on the exercise of market
24 power by MasterCard and Visa?

25 A I think he has. I mean, that's how I interpret his

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1 testimony.

2 Q Let's look at slide 106. This is one of the excerpts of
3 his testimony in this trial to that effect.

4 A I'm sorry, was there a question?

5 Q Yes. The question is is this one of the excerpts from
6 his testimony in this trial to that effect?

7 A Yes, it is.

8 Q Now, we looked a few moments ago at the Chase Bank
9 comment about duplicating the playbook on the issuer side of
10 the market, duplicating Amex's playbook.

11 Has that mimicry, if you will, that form of
12 competition been limited to the issuer side of this two-sided
13 market?

14 A No, it hasn't. Amex has, through its closed-loop
15 network, been able to create a system of accumulating and
16 analyzing data that's been extremely useful for serving
17 merchants and others have tried to mimic that as well.

18 Q Let's go back to, I guess, slide 107, which is just
19 moving through the bullets on your slide about what the NDPs
20 enable.

21 Under the "key question" bullet you have a statement
22 that says: "NDPs ensure welcome acceptance which is critical
23 to Amex's differentiated product and viability."

24 We've heard a lot about welcome acceptance. I don't
25 want to rehash and repeat all of that testimony, but what, if

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1 anything, is the significance for you raising it here in your
2 analysis of what the NDPs enable in your competitive effects
3 analysis?

4 A The point that we're going to here is that welcome
5 acceptance places -- welcome acceptance is an essential piece
6 of the -- of ensuring that the payment products that Amex is
7 offering consumers has high value to the consumers and
8 delivers what Amex is promising those consumers. It has been
9 a core piece, a cornerstone of Amex's business strategy and
10 has enabled that strategy.

11 And I'm also explaining here that the NDPs are
12 critical for making sure that welcome acceptance is
13 guaranteed. This is -- this is what we were talking about
14 earlier, about the purpose of vertical relationships with
15 parties that are at the next level of the chain of production.
16 The purpose of those relationships is often to make sure that
17 the other party is acting in a way that's consistent with
18 delivering the final product to consumers with the
19 characteristics that you are trying to deliver because you
20 know that that's valuable to those customers, and the point
21 here is that the NDPs are essential for Amex to accomplish
22 that.

23 Q Now, was this a principle or a core recognition at
24 American Express long before this litigation ever arose?

25 A Well, the -- yes, the importance of welcome acceptance

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1 has been emphasized for a long time. I think that there's,
2 you know, literally decades of business experience at Amex
3 underscoring its importance.

4 Q If we look at slide 108, do you recall what that document
5 is from the record?

6 A Yes, this is an excerpt from a speech by Ken Chenault and
7 I believe this was part of what's sometimes called the "call
8 to arms" speech. So this comes from 1996, so this -- this is
9 at a point in time when Amex was a rather beleaguered company,
10 and what I think is really striking here is the final sentence
11 of the quote that is popped out: "Without welcome acceptance,
12 the rest of our value proposition has only marginal value."
13 That's a very powerful statement, and I think that a lot of
14 what you see in the Amex testimony and a lot of what you see
15 in the Amex business documents is consistent with this
16 principle that they have built a product that has a value
17 proposition that is dependent upon achieving welcome
18 acceptance.

19 Q Now, you've mentioned a couple of times that in vertical
20 relationships and in this particular vertical relationship it
21 is not uncommon for there to be some misalignment between the
22 interests of the two parties to the arrangement?

23 A That is correct.

24 Q Is there -- well, let me ask it this way.

25 Why is it in this particular case, let's talk about

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1 Amex and its merchants, what is it about that relationship
2 that creates the misalignment? Why are the NDPs necessary in
3 effect to get the parties on the same page as a matter of
4 contract to deal with some kind of a misalignment of
5 interests?

6 A So that has to do with the consequences of not coming
7 through with welcome acceptance, the difference between the
8 consequences for the merchant and for Amex.

9 Q Explain that.

10 A Well, the merchant's consequences depend upon how the
11 consumer reacts to that particular transaction and whether
12 that -- you know, how that consumer feels about shopping at
13 the store. There are some issues for the merchant to consider
14 there, but the merchant can also manage the customer's
15 reaction because the merchant is at the point of sale, and an
16 unpleasant experience that has to do with a credit card, the
17 merchant is in a position to avoid the blame for. So, you
18 know, we -- gee, we prefer Visa, we do it because, you know,
19 Amex does things that we don't like. So the merchant is in a
20 position of suffering limited consequences from having
21 consumers experience a transaction that doesn't deliver on the
22 promise of welcome acceptance.

23 On the other hand, Amex has very different
24 consequences. Amex's consequences from that same event are
25 potentially more profound. The consumer is disappointed,

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1 feels that Amex is not giving them the kind of payment
2 experience they expect, may stop using the Amex card
3 regularly, may use another card in preference to that card.
4 And then again we're back into this cycle, if this is
5 happening to a large number of consumers, then the Amex card
6 is less valuable to merchants and we have the feedback effects
7 through the network effects and Amex suffers rather severe
8 consequences.

9 So the interests of the merchant and Amex are not
10 perfectly aligned here by any means.

11 Q Have you seen evidence beyond just the NDPs themselves
12 that Amex has the provisions to attempt to align those
13 interests between the company and its merchants?

14 A Well, you know, one thing that I think is worth remarking
15 on is that this is spelled out explicitly in the agreement
16 that contains the NDPs.

17 Q Let's look at slide 109.

18 It says it's from Amex's merchant regulations from
19 2012, correct?

20 A Correct.

21 Q So what does this slide show?

22 A Well, this is what we've done is pop out a quote here
23 from -- from these merchant regulations and this is in the
24 context of the NDPs and saying: "Amex has built a brand that
25 is synonymous with trust, integrity, security, quality, and

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1 customer service. We work diligently to uphold our reputation
2 and restrict merchants from engaging in activities that would
3 harm our business or brand."

4 And that is a very clear statement of the general
5 economic principles that I've just been articulating. The
6 fact that they put it in their agreement obviously is not
7 proof that that was their motive, but I find it telling that
8 this isn't something that, you know, it isn't something that
9 I'm just making up here. It's something that Amex highlights
10 in its -- in the agreements that contain these provisions.

11 THE COURT: Regarding these preference campaigns,
12 for instance, Amex agrees from time to time and negotiated
13 with major merchants to permit some degree of preference
14 campaigns, but with regard to the small merchants, there is no
15 negotiation, there's a standard form, and preference,
16 statements of preference to a different form of credit card
17 are not permitted. So basically where the merchant has market
18 power in a sense, if you will, or has leverage, if you will,
19 Amex makes concessions, but where an individual merchant would
20 not have that kind of leverage, Amex makes no concession.

21 What's the difference in permitting a preference
22 campaign for a large merchant who has leverage and not
23 permitting it for small merchant who does not?

24 THE WITNESS: First of all, I just want to remind
25 you of one of the things that I showed you about small

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1 merchants. It's actually small merchants where the Amex
2 premium is negative. That is Amex is cheaper than Visa and
3 MasterCard at small merchants. They get a better deal
4 relative to Visa and MasterCard than large merchants do. This
5 was a surprise to me when I analyzed the data.

6 THE COURT: And it's a new, to the extent that it
7 exists, it's a relatively new situation.

8 THE WITNESS: That we don't know.

9 THE COURT: Or at least the perception --

10 THE WITNESS: Yes.

11 THE COURT: -- which doesn't follow, I might add,
12 it would appear, that it is in the past smaller merchants,
13 many of them have had the impression, if not the fact, that
14 the American Express discount rate was higher than Visa and
15 MasterCard, right?

16 THE WITNESS: Yes, I think it's -- I think that's
17 undeniable that there's been a perception.

18 THE COURT: To the extent that now Visa and
19 MasterCard, certain cards within those two systems have jacked
20 up their rates because of the rewards programs, that's a
21 relatively new phenomenon, right? I mean, that's the
22 evidence in this case at least.

23 THE WITNESS: That is a relatively new phenomena,
24 and unfortunately we can't answer the question how far back
25 does the negative Amex premium at small merchants go simply

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1 because we don't have the data. So we can't resolve that.

2 But as to your question, you were asking about
3 negotiating these things. At a large merchant, there is an
4 opportunity to carefully weigh the benefits of an exception to
5 the merchant against the costs of the exception to Amex, which
6 could be large, benefits could be large. They have a
7 bilateral negotiation and they work it out, you know, there's
8 horse-trading and they do something that's mutually efficient.
9 If the gain to you is larger than the loss to me, hey, we can
10 cut a deal where we make a side payment and we're both better
11 off. So they do it, but it takes a lot of time and
12 negotiation, and I think the reason that this doesn't happen
13 at small merchants has more to do with the difficulty of
14 negotiating merchant-by-merchant.

15 So Amex has used a form that is, you know, by its
16 nature has to be one-size-fits-all, so it's the best
17 approximation to the most efficient way to do this, but you're
18 right, in any given case, it may not be exactly right, might
19 be more efficient to negotiate certain exceptions, but that's
20 just extraordinarily costly to do on a case-by-case basis for
21 millions of merchants.

22 THE COURT: Thank you.

23 I also understand that many of these arrangements
24 are short-term arrangements and for limited purposes. So we
25 don't need to relitigate that. That's already in the record.

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1 I'm just saying that we have had testimony on that subject and
2 I wanted to hear from the expert on that issue.

3 MR. CHESLER: Understood, Your Honor.

4 If I may, let me ask one other question. Then I
5 think we're at a logical place to stop.

6 THE COURT: Okay. Go ahead.

7 MR. CHESLER: I want to follow up on something Your
8 Honor just asked.

9 BY MR. CHESLER:

10 Q So the Court just asked you about whether there's a
11 difference and, if so, its significance between the
12 concessions that are made in negotiations with the large
13 merchants and the situation with the smaller merchants, and
14 you pointed out that the evidence shows that the smaller
15 merchants are actually as a group paying less for American
16 Express than for Visa and MasterCard, correct?

17 A Correct.

18 Q Do you recall Professor Katz's testimony when I was
19 asking him about the millions of merchant locations in the
20 United States that do not accept American Express and
21 therefore are dealing with in a world where there are no
22 non-discrimination provisions because Visa and MasterCard have
23 agreed to drop theirs? Do you recall that part of his
24 testimony?

25 A Yes, I do.

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1 Q Do you recall him testifying that one of the reasons he
2 believes that there has been no change at those merchants is
3 because small merchants would not benefit from steering?

4 A I'm sorry, but I don't remember that particular
5 testimony.

6 THE COURT: Well, you'll be able to check that
7 overnight.

8 And Mr. Chesler will be back tomorrow morning to ask
9 you the question again, I think.

10 MR. CHESLER: He's back.

11 THE COURT: All right. Let me just ask, we're up to
12 page 109. About how much longer do you think the direct will
13 be?

14 MR. CHESLER: I'd say, Your Honor --

15 THE COURT: As long as you're not interrupted by the
16 Court. Go ahead.

17 MR. CHESLER: Which obviously you can do any time
18 you wish.

19 Sixty, 80 minutes, something like that.

20 THE COURT: All right, fine. And the cross, what's
21 your estimate?

22 MR. CONRATH: Probably at least four hours, maybe
23 somewhat more, Your Honor.

24 THE COURT: All right. Well, we may get done
25 tomorrow. Otherwise the witness can go down to Broadway and

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1 buy some theater tickets for the weekend because we'll resume
2 on Monday after tomorrow.

3 MR. CHESLER: How late will Your Honor be able to
4 sit tomorrow, just so we have some planning?

5 THE COURT: I'm going to try to stay as long as it
6 takes to finish the witness, obviously, but 6:00, 7:00, you
7 know, something like that. That would probably do it. In
8 case it doesn't, I just wanted to advise that we're not
9 meeting on Friday.

10 MR. CHESLER: Yes, Your Honor.

11 THE COURT: Is there anything else from you, Mr.
12 Chesler, or from anyone else at the defense table for tonight?

13 MR. CHESLER: No, Your Honor.

14 THE COURT: Okay. Anything from you, Mr. Conrath?

15 MR. CONRATH: Nothing from us, Your Honor.

16 THE COURT: All right. We'll see you tomorrow
17 morning at nine o'clock. Thank you.

18 (Time noted: 6:00 p.m.)

19 (Whereupon, the proceedings were adjourned to
20 August 14, 2014, at 9:00 a.m.)
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<p>9</p> <p>90 [3] 6305/23 6369/16 6369/18</p>		

<p>A</p> <p>adjusted [2] 6343/23 6344/8</p> <p>adjusting [1] 6336/20</p> <p>adjustment [3] 6228/9 6317/19 6343/23</p> <p>adjusts [1] 6328/2</p> <p>admirable [1] 6392/7</p> <p>admission [2] 6112/16 6197/20</p> <p>admissions [2] 6197/14 6199/5</p> <p>admit [4] 6112/13 6193/13 6194/10 6194/21</p> <p>admitted [7] 6112/20 6193/10 6193/20 6193/22 6193/24 6195/24 6195/25</p> <p>adopt [1] 6378/22</p> <p>adopted [2] 6197/13 6224/14</p> <p>adoptive [1] 6197/19</p> <p>advancing [1] 6284/15</p> <p>advantage [5] 6133/12 6187/17 6187/25 6260/6 6261/25</p> <p>advantages [4] 6119/11 6119/13 6119/20 6307/18</p> <p>advertise [5] 6127/3 6127/10 6132/16 6181/21 6182/22</p> <p>advertisement [2] 6182/24 6376/25</p> <p>advertisements [3] 6212/18 6212/20 6309/21</p> <p>advertisers [1] 6309/21</p> <p>advertising [3] 6182/10 6212/17 6377/5</p> <p>advise [3] 6138/25 6188/2 6409/8</p> <p>affect [3] 6325/14 6389/25 6393/19</p> <p>affected [1] 6247/10</p> <p>affects [3] 6254/4 6357/22 6394/22</p> <p>affiliated [2] 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